Central Law Journal.

ST. LOUIS, MO., JUNE 15, 1900.

All who are interested in inheritances are affected by an opinion recently rendered by the United States Supreme Court. It has been the ruling of the internal revenue commissioner that "the whole amount of personal property left for distribution after payment of legal debts and expenses determines the rate of tax imposed on legacies and distributive shares, without regard to the amount or value of each legacy or distributive share." Under this ruling a large amount of tax has been paid on inheritances. But a case involving the correctness of the commissioner's ruling was carried to the United States Supreme Court, and that body has now determined the matter as follows, reversing the commissioner: "The phrase 'whole amount of such personal property as aforesaid' relates to the sum of each legacy or distributive share considered separately. Legacies not exceeding $10,000 are not taxed. The rate of tax is progressively increased by the amount of each separate legacy or distributive share, and not by the whole amount of the personal estate from which the legacies on distributive shares were derived."

The opinion of Judge Lochren, of the United States Circuit Court, District of Minnesota, in *Ex parte* Ortiz, which has created so much public discussion, grew largely out of its real or supposed bearing upon the tariff legislation for Porto Rico. The part of the opinion which excited political interest was really *obiter*. What was actually held was that when the petitioner was tried by a military tribunal in Porto Rico, such tribunal had jurisdiction to try, convict and sentence him, as the treaty which ceded the island to the United States, although signed, had not become effective as to private rights, because the exchange of ratifications was not completed until some time thereafter. The petitioner had been convicted of murder and was sentenced to death. Such sentence was thereafter commuted by the president of the United States to imprisonment for life in the Minnesota State Prison, at Stillwater, Minnesota. The proceeding before Judge Lochren was upon a writ of *habeas corpus* for his discharge, and it was held that the application for discharge must be denied, because, in any view, the military tribunal had jurisdiction.

The reasoning of the opinion upon the constitutional question discussed is, however, cogent and worthy of serious attention. Judge Lochren took the ground that as to the newly acquired territory of the United States, the federal constitution applies *ex proprio vigore*, and becomes the supreme law of the land. His discussion relates specially to the bill of rights of the constitution. The purport of the reasoning is that congress may not legislate as to the government of new territory except within the limitations of such bill of rights.

An English exchange calls attention to a recent case in that country which suggests the difficulty of defining what constitutes an "attempt" to commit a crime. In Reg. v. Maddock, the defendant was indicted for attempting to commit arson. It was proved that he had placed a quantity of inflammable substances on the floor of a certain house, saturated them with methylated spirits, and placed a freshly trimmed candle in the midst. Not having lighted the candle, it was argued on the motion to quash the indictment, that the prisoner had merely made preparations to commit a felony, and had not gone far enough for his acts to constitute an attempt in law, and that in order to convict of an attempt the prisoner must be shown to have done the last act depending on himself, with the intention to commit the offense. On the other hand, it was argued that the acts of the prisoner clearly showed what his intentions were, and were sufficiently proximate to the commission of the offense to amount to an attempt. Lawrance, J., quashed the indictment, and refused to state a case, holding that as something remained to be done by the prisoner, and there was no interruption, that what he did was not an attempt at law. The Solicitors Journal, with reason, questions the correctness of this decision upon the ground that too much stress was laid upon the question of interruption. "This is a point," says our London contemporary, "upon which much stress should not be laid,

at all events, unless it is clear that the accused had voluntarily abandoned his criminal intention. It may be that, although not interrupted, he was merely awaiting a good opportunity to complete his purpose when, his preparations being discovered, he was arrested. In such a case it seems rather unfortunate if it is correct law that, whatever elaborate preparations a man may have made with the intention of committing a crime, he cannot be punished unless he has completed the series of acts which he intended."

NOTES OF IMPORTANT DECISIONS.

SUPPRESSION OF MOB VIOLENCE—CONSTITUTIONAL LAW.—In Board of Commissioners v. Church, 57 N. E. Rep. 50, decided by the Supreme Court of Ohio, it was held that the act of the legislature of that State entitled "An act for the suppression of mob violence," passed April 10, 1896, is constitutional; that the recovery authorized by said act is penal in its nature, and it is within the legislative power to provide therefor. Such legislation is not an exercise of judicial power, nor is it a violation of the right of trial by jury; that such recovery, and the tax levy authorized and required by said act, are within the general powers of the legislature and the provisions of section 7, article 10, of the constitution, and such recovery and levy are not in contravention of section 19, article 1, of the constitution; that in an action brought under such statute, to recover the penalty of $5,000 for the death of a person caused by lynching, it is error for the court to charge the jury to the effect that, if the collection of individuals who lynched the deceased had assembled without any unlawful purpose, and afterwards committed the acts of violence which resulted in the death of such person, the plaintiff could not recover, and that the verdict should be for the defendant; and that in an action brought under such statute to recover the penalty for an injury caused by lynching, where it is sufficiently alleged in the petition that the plaintiff had suffered a lynching at the hands of a mob composed of a collection of individuals, who had assembled for an unlawful purpose, and attempted to exercise correctional power over the plaintiff and his fellows, the allegations in the petition are not negatived by the specific averments, also contained in the petition, that the plaintiff was struck by "a heavy glass insulator thrown at him by one of the mob," and that he was "shot through the leg with a leaden bullet fired from a revolver in the hands of some of the mob."

CRIMINAL LAW—PRINCIPAL AND ACCESSORY.—In Strait v. State, 27 South. Rep. 617, decided by the Supreme Court of Mississippi, it appeared that the prosecutors had reason to believe their office had been entered by defendant, and hired a detective to investigate the matter, and, under the pretense of getting a bundle he had left, the detective borrowed defendant's key and entered the office, accompanied by the defendant, when they were immediately arrested. It was held that a conviction of the defendant for burglary was improper, because his principal was not guilty, since he entered the office under the license of the prosecutors. The following is the opinion:

"Joshua Strait, a colored boy, was indicted in the circuit court of Lauderdale county of burglary in breaking and entering the law office of Ethridge & McBeath with intent to steal. Ethridge & McBeath were attorneys at law at Meridian, Miss., and, having a belief that their office had been often entered by some person, and having a suspicion that the defendant was such person, one or both of the prosecutors requested Green Morton to trace up the matter. Strait was the office boy at a neighboring office, and had the keys thereto of his master. Green Morton, in laying a snare for defendant, pretended to him that he had left a bundle in the office of Ethridge & McBeath, and received from Strait the key used by him in his employment, and with it opened the office of Ethridge & McBeath, and entered the same, and the defendant, Strait, also entered with him, and being immediately set upon, they were arrested, and the defendant being indicted and convicted of burglary, he appeals. Green Morton, in endeavoring to entrap the defendant, and in getting from him the key with which he opened the office of Ethridge & McBeath, and in leading the defendant into said office, was acting at the instance of the prosecutors, either as a decoy or as a detective, and in either case he was operating under the license of the owners, and could not have been guilty of an unlawful act; and, because Morton was not guilty of burglary, the defendant could not be guilty of burglary in entering the office at the instance and by the act of Morton. Green Morton himself opened the door of the office of Ethridge & McBeath, and, unless he is guilty of burglary as the principal felon, the defendant cannot be guilty of crime. At common law the actual doer of an illegal act amounting to felony was called a principal in the first degree, and another being with him to aid or assist in the commission of the act is denominated a principal in the second degree, and a principal, in the second degree could only be guilty of the crime committed by the principal in the first degree. It is plain that Morton is not guilty of burglary, because he was acting at the instance of the prosecutors, and he was expected by the prosecutors to use his own judgment in luring the defendant into a trap to be set for him. Whart. Cr. Law, sec. 117; U. S. v. Libby, 1 Woodb. & M., 221, Fed. Cas. No. 15,597. In 1 McClain Cr. Law, sec. 118, it is said: 'The only question in the case of decoys is as to whether defendant has

committed a criminal act. Of course, if he has joined with one who pretends to be a confederate, but in reality is acting as a detective, and, therefore, has no criminal intent, he will not be criminally liable for acts done by the detective, although present to aid and assist; for, while such presence and aid would make him a confederate in the case of a real crime, it cannot render him guilty where no real crime is committed. Thus, it is held that if, in burglary, an officer or a servant, under the instructions of the owner, admits the intended burglar to the house, pretending to be in collusion with him, there is no burglary committed.' Maule, J., so ruled in Reg. v. Johnson, Car. & M. 218, 41 E. C. L. 123. Ten of the twelve judges of the exchequer chamber so ruled in Donnelly's case. 1 Russ. & R. 310. And this is the American doctrine. Love v. People, 160 Ill. 501, 43 N. E. Rep. 710, 32 L. R. A. 139; People v. McCord. 76 Mich. 200, 205, 42 N. W. Rep. 1106; Connor v. People (Colo. Sup.), 33 Pac. Rep. 159, 25 L. R. A. 341. The defendant was let into the office of the owners by a decoy operating at their instance, and, however reprehensible the act be morally, he is not guilty of burglary. His conviction was wrongful."

MASTER AND SERVANT—ASSAULT BY SERVANT—SCOPE OF EMPLOYMENT.—In Berg man v. Hendrickson, decided by the Supreme Court of Wisconsin, it appeared that plaintiff, after ordering liquor in defendant's saloon, refused to pay for the same, and, after some altercation, the bartender assaulted him so that he sustained injuries. It was held that if the assault was committed for the purpose of compelling payment, the servant was acting within the scope of his employment, and hence the master was liable for plaintiff's injuries, though he may have never authorized such method of collection, or may have expressly prohibited it. The evidence in this case showed that plaintiff, after ordering the liquor refused payment, and, after some altercation, the bartender assaulted him so that he sustained injuries. The bartender testified plaintiff, during the altercation, made a threatening gesture, and used a vile epithet. It was held that though plaintiff conducted himself in such a manner as to bring on a personal altercation with the bartender, and the assault was in part the result of such conduct, defendant was liable for the assault committed in the scope of the bartender's employment. The court said:

"The appellants contend further that, although the bartender may have been acting within the scope of his duties, the master is not liable if the plaintiff, by words or acts, conducted himself in such improper manner as was calculated to arouse and bring on personal altercation with the bartender, and the assault complained of was wholly or in part the result of such misbehavior on the part of the plaintiff. The court refused a requested instruction to that effect, and, on the contrary, charged: 'If Blackstrom was impelled to the assault, whatever words may have passed, by a purpose to enforce payment of the liquor bill that he was trying to collect, and committed the assault as incidental to such effort, plaintiff should recover.' The rule thus laid down by the court is that sanctioned by the authorities above cited; and the exception thereto, contended for by appellants, in case of misconduct or verbal provocation on the part of plaintiff, is nowhere recognized. Such an exception would ignore the principle on which the liability is founded, namely, that the tortious act of the servant, when within scope of his duty, is the act of the master himself. That being the principle, the tort, when so committed by the servant, can be justified on no grounds less cogent than those which would serve as justification of the same act if committed by the master. In Rogahn v. Foundry Co., 79 Wis. 575, 48 N. W. Rep. 669, it is said: 'It is generally agreed that for negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible.' It need hardly be stated that neither insult nor vituperation can fully justify assault and battery, though they may properly mitigate damages in civil actions or punishment in criminal prosecutions. Appellants press upon our attention, supporting the exemption of the master in case of misconduct or insult by plaintiff to the servant, the case of Scott v. Railroad Co., 53 Hun, 414, 6 N. Y. Supp. 382, which, upon examination, proves to have no relevancy whatever. That case deals with a very different ground of liability, namely, that which is imposed on the master for willful torts of a servant, although outside of the line of his duty, when the relations between the master and the plaintiff are such that the former is under an obligation to protect the latter against such wrongs, whether committed by servants or others. That liability is well stated and illustrated in Craker v. Railway Co., 36 Wis. 657, and Fick v. Railway Co., 68 Wis. 469, 32 N. W. Rep. 527, and is grounded not so much on the principle of *respondeat superior* as upon the failure of a carrier to perform its duty to protect its passengers and patrons. Such was the case urged on us by the appellants. There the driver of a street car assaulted a passenger to avenge insults and threats offered to him personally. His act was wholly personal, and outside the scope of his employment. The plaintiff's right of recovery depended, not on the fact that the assault was committed by a servant, but on the fact that he suffered any assault while entitled to protection as a passenger. The rule of law declared in that case was responsive to the situation, and went no further than to hold that a passenger is entitled to protection only so long as his own conduct merits it, and that the carrier is not bound to protect him against the usual and probable results of his own misbehavior. If the soundness of that doctrine were fully conceded, it would not affect defendants'

liability in the present case, predicated not on failure to protect, but upon defendants' own affirmative wrong, committed through their servant, acting in the line of his duty."

ONCE A MORTGAGE ALWAYS A MORTGAGE — STIPULATIONS IN THE MORTGAGE.

Origin and Meaning of the Maxim.—A mortgage in the form first known to the law of England was strictly an estate upon condition. If the mortgagor failed to perform at the time and in the manner prescribed, the land mortgaged passed absolutely to the mortgagee.[1] Where the value of the mortgaged premises greatly exceeded the amount loaned to the mortgagor, the forfeiture of his estate for failure to repay the loan exactly at the time and in the manner specified was repugnant to the ideas of justice even then current. Consequently equity courts, at an early period, granted relief to the mortgagor, allowing him to redeem by paying costs to the mortgagee, together with the original loan, and interest thereon, up to the time of redeeming.[2] In this interference of courts of equity to protect the mortgagor against the hardship which he would otherwise have suffered through the rigid enforcement of his contract, they were but applying an equitable principle more ancient than the common law itself, the principle, namely, which the courts of Rome applied to prevent a forfeiture of the pledge when the pledger omitted to make payment on the day specified,[3] and upon which, in modern times, both courts of law and equity proceed in declaring a stipulation calculated merely as an incentive to the performance of the main undertaking with which it is alternative, to be in the nature of a penalty, and not enforcible against the obligor according to the letter of the stipulation. In strict adherence to this principle, the maxim "Once a mortgage always a mortgage" was formulated by courts of equity as expressive of their determination to forestall every effort of the mortgagee to cut off what they had declared to be the mortgagor's right of redemption.[4]

Stipulations Destroying Absolutely the Right of Redemption.—The maxim "Once a mortgage always a mortgage" is in fact but a terse declaration that the right of redemption is a necessary incident to every mortgage, and that the parties to a transaction which, in legal effect, constitutes a mortgage, cannot by any stipulation, however express and emphatic, deprive the mortgagor of the right, within reasonable time after condition broken, to recover the property on the terms which equity exacts for its redemption.[5] So firmly established has this maxim become that the mortgagor will be allowed to redeem, even though he may have bound himself under oath not to do so.[6] It matters not that the parties themselves may have regarded the right of redemption as barred, upon the happening of the contingency named, and that they may have made time of the essence of their contract,[7] or that they may never have

[1] Story, Eq. Jur. 1004, 1012, 1311; 2 Bl. Com. 157, 158; Co. Litt. 205a; Pomeroy, Eq. Jur. 1199; Hickman v. Cantrell, 30 Am. Dec. 396; Chamberlain v. Thompson, 26 Am. Dec. 390; Bank v. Mathews, 63 N. W. Rep. 930.

[2] 2 Bl. Com. 158.

[3] Story, Eq. Jur. 1005, 1007.

[4] Story, Eq. Jur. 1013; 1 Jones, Mort. 7; Newcomb v. Bonham, 1 Vern. 7.

[5] Howard v. Harris, 1 Vern. 33; Newcomb v. Bonham, *Id.* 7; Willets v. Winnell, *Id.* 488; Jennings v. Ward, 2 *Id.* 520; East India Co. v. Atkyns, Comyn's Reports, 346; Spurgeon v. Collier, 1 Eden, 55; Jason v. Eyres, 2 Ch. Cases, 33; Floyer v. Livingston, 1 P. Wms. 268; Goodman v. Grierson, 2 Ball & B. 274, 278; Cowdry v. Day, 1 Giff. 316; Pritchard v. Elton, 38 Conn. 434; Henry v. Davis, 7 Johns. Ch. 40; Clark v. Henry, 2 Cow. 324; Rankin v. Mortimer, 7 Watts, 372; Jaques v. Weeks, *Id.* 261; Heister v. Maderia, 3 W. & S. 384; Johnson v. Gray, 16 Serg. & R. 361; Clark v. Condit, 18 N. J. Eq. 358; Vanderhaize v. Hughes, 2 Beasl. 244, 410; Robinson v. Farrelly, 16 Ala. 472; Heirs of Stover v. Heirs of Bounds, 1 Ohio St. 107; Cherry v. Bowen, 4 Sneed, 415; McNees v. Swaney, 50 Mo. 388, 391; Wilson v. Drumrite, 21 Mo. 325; Pierce v. Robinson, 13 Cal. 116, 125; Lee v. Evans, 8 Cal. 424; Rogan v. Walker, 1 Wis. 527; Story, Eq. Jur. 1019; Quartermous v. Kennedy, 29 Ark. 544; Flagg v. Mann, 2 Sumn. 486, 527; Youle v. Richards, 23 Am. Dec. 722; Jackson v. Lynch, 129 Ill. 72, 22 N. E. Rep. 246; James v. Oades, 2 Vern. 402; Cook v. Cooper, 22 Pac. Rep. 945; Penin. Trad. & Fish Co. v. Steam Whaling Co. (Cal.), 56 Pac. Rep. 604; Wilde v. Homan, 79 N. W. Rep. 546; O'Toole v. Omlie, 67 N. W. Rep. 187; Morrow v. Johns, 41 Neb. 867, 60 N. W. Rep. 369; Bank v. Mathews, 45 Neb. 659; Heaton v. Darling, 68 N. W. Rep. 1088; Jones v. Blake, 33 Minn. 362, 23 N. W. Rep. 538; Peugh v. Davis, 96 U. S. 332; Fields v. Helms, 82 Ala. 449; Thompson v. Mack, Har. Ch. (Mich.) 150; Batty v. Snook, 5 Mich. 233; Clark v. Landon, 90 Mich. 83; Tower v. Fetz, 42 N. W. Rep. 884; Marshall v. Thompson (Minn.), 39 N. W. Rep. 311; Haggerty v. Brower (Iowa), 75 N. W. Rep. 321; Schierl v. Newberg (Wis.), 78 N. W. Rep. 761; Harrington v. Foley (Iowa), 79 N. W. Rep. 64; Niggeler v. Maurin (Minn.), 24 N. W. Rep. 369.

[6] East India Co. v. Atkins, Comyn's Reports, 347, 349.

[7] Batty v. Snook, 5 Mich. 233; Clark v. Landon, 90

thought of their relationship as that of mortgagor and mortgagee.[8] This rule is universal, if there are any cases where a stipulation in the instrument, at its inception, was apparently allowed to cut off the right of redemption upon the happening of the contingency named, it will be found that the instrument was construed to be something other than a mortgage.[9]

Stipulations which Destroy in Part the Right of Redemption.—No doubt the reasons forbidding a total destruction should also forbid a partial destruction of the right of redemption, and this would seem to be the law.[10] Yet it is not always clear whether a stipulation should be regarded as infringing the right of redemption. Upon some points, however, there seems to be a general agreement. Thus, it is well settled that the parties cannot restrict the time for redeeming to a period shorter than that allowed by law.[11] Nor can they make any restrictions as to the persons who may redeem.[12] It is obvious that such restrictions directly attack the right of redemption itself, for if either were but pushed far enough it would totally destroy that right.

Stipulations Giving the Mortgagee the Right to Possession, or to the Rents and Profits, upon the Mortgagor's Default.—But it is not so clear how a stipulation by which, upon the mortgagor's default, the mortgagee shall have the right to the possession or to the usufruct of the mortgaged premises, can be regarded as a partial destruction of the right of redemption. Certainly in those States where the law gives the mortgagee the legal title, either before[13] or after[14] condition broken, there could be no question at all as to the validity of such a stipulation, whatever its effect upon the power and right of redeeming. It is only in States where the right of possession remains in the mortgagor until after foreclosure[15] that there can be any doubt as to the right of the mortgagee to gain possession sooner by stipulation. And Mr. Jones, in his work on Mortgages, expresses the opinion that in Iowa, Kansas and Nevada the statutes imply that the right of possession may be given to the mortgagee by stipulation.[16] So far as the writer has been able to discover, the only courts that have decided against the validity of a stipulation giving the mortgagee the right to possession upon the mortgagor's default are those of Michigan, Oregon, Montana and Minnesota, while in Michigan alone has the question received extended discussion.

The Decisions in Oregon, Minnesota and Montana.—In Teal v. Walker[17] the Supreme Court of the United States held that inasmuch as the legislature of Oregon had given the mortgagor the right to the possession of the mortgaged premises until foreclosure absolute, any stipulation in the mortgage waiving such right upon default of the mortgagor must be regarded as contrary to the policy of the law of that State and void. In Cullen v. Foote[18] the Minnesota court held that although the mortgagee could not by stipulation gain the right to apply the rents of the mortgaged premises to the payment of the

Mich. 83; Baily v. Bayley, 5 Gray (Mass.), 505; Penin. Trad. & Fish Co. v. Steam Whaling Co. (Cal.), 56 Pac. Rep. 604.

[8] Opinion of Denio, V. C., in Holmes v. Grant, 8 Paige Ch. Rep. 246; Brown v. Dewey, 1 Sandf. Ch. Rep. 73; Batty v. Snook, 5 Mich. 233; Clark v. Landon, 90 Mich. 83; Colwell v. Woods, 27 Am. Dec. 345.

[9] Glendinning v. Johnson, 33 Wis. 347; Henry v. Hoatling, 41 Cal. 22; Bodwell v. Webster (Mass.), 13 Pick. 411.

[10] Henry v. Davis, 7 Johns. Ch. 40; Hazeltine v. Granger, 44 Mich. 503.

[11] Pomeroy, Eq. Jur. 1193, note 5; Flagg v. Mann, 2 Sumn. 486, 527; Livingston v. Storey, 11 Peters, 352; Heirs of Stover v. Heirs of Bounds, 1 Ohio St. 107; Goodman v. Grierson, 2 Ball & B. 274; Cowdry v. Day, 1 Giff. 316; Youle v. Richards, 23 Am. Dec. 722; Quartermous v. Kennedy, 29 Ark. 544; Jackson v. Lynch, 129 Ill. 72, 22 N. E. Rep. 246.

[12] Pomeroy, Eq. Jur. 1193, note 5; Story, Eq. Jur. 1019; Fonbl. Eq. B. 2 Ch. 3, 4, and note 5c; Butler's note 1 to Co. Litt. 204b; Bonham v. Newcomb, 1 Vern. 232; Seton v. Slade, 7 Ves. 275; 4 Kent, Com. Lect. (4th Ed.) 58, p. 152; Holridge v. Gillespie, 2 Johns. Ch. 33; Com. Dig. Ch. 4a, 1, 2; Cortelyon v. Lansing, 2 Caine's Cas. Err. 209, 210; Johnson v. Gray, 16 S. & R. (Penn.) 361; Youle v. Richards, 23 Am. Dec. 722; Howard v. Harris, 1 Vern. 33; Spnrgeon v. Collier, 1 Eden, 55.

[13] Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia and West Virginia. See 1 Jones, Mortgages 58.

[14] Delaware, Mississippi and Missouri.

[15] California, Dakota, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, Oregon, South Carolina, Texas, Utah, Washington, Wisconsin. See 1 Jones, Mort. 58.

[16] 1 Jones, Mort. 58. The right to stipulate for possession is also recognized in Nebraska Gen. St. ch. 61, sec. 55; Morton v. Covell, 6 N. W. Rep. 477.

[17] 111 U. S. 251.

[18] 61 N. W. Rep. 818. But see Rice v. R. R. Co., 24 Minn. 464.

debt, a stipulation that the rents should be applied to the payment of taxes and insurance was valid. In Fee v. Swingly[19] the Supreme Court of Montana denied the validity of any stipulation for possession by the mortgagee before foreclosure. Yet in each of these States a mortgagee who gains lawful possession after condition broken cannot be ousted by the mortgagor until the latter has paid the mortgage debt.[20] It is difficult to see on what theory a mortgagee can be allowed to exact payment as a condition precedent to his relinquishment of a possession to which he could gain no right whatever by the contract under which the indebtedness was created. If in consideration of the loan he cannot make a valid stipulation for possession upon default, what consideration is there to uphold the possession subsequently conferred upon him by the mortgagor? Possession so conferred is a mere gratuity. Can the mortgagee then obtain a right by gift which he could not obtain by contract? The courts of the three States referred to seem to have answered this question in the affirmative. But it is believed that with these exceptions the States where the mortgagor is compelled to redeem in order to regain possession[21] recognize the validity of a stipulation giving the mortgagee the right to possession upon default by the mortgagor.[22]

The Michigan Cases.—In Michigan the general rule that a mortgagee who has gained peaceable possession can be ousted only after payment by the mortgagor, is not recognized.[23] Hence the incongruity above noted is avoided there; and were it not for *dicta* in more recent decisions, the case of Hazeltine v. Granger[24] would be conclusive against the validity of a stipulation for possession upon the mortgagor's default. In this case the stipulation provided that upon default by the mortgagor the mortgagee might have a receiver appointed without notice, and that the rents and profits should then be applied to the payment of the debt. Campbell, J., pointing out that the statute of 1843 secured the mortgagor in his possession until foreclosure had become absolute, used the following language: "The statute does not say that no ejectment shall lie unless there is an agreement to that effect, but that it shall not lie at all. Every mortgage made in common law form contains words whereby if applied as they read, possession would belong to the mortgagee and his title would become absolute upon default. The whole aim of equity was to arrest this forfeiture and not to allow the language of a mortgage to have any force against the equity of redemption. The statute is a further step in the same direction for the protection of the mortgagor, against agreements which is literally drawn and theretofore expounded were deemed dangerous and against public policy. The language of this mortgage expressly granting rents and profits, is no stronger than the previous words of grant and is really narrowed. It was no doubt intended to go further and evade the statute. If it had contained an agreement that ejectment should lie, it could not very well be enforced against the clause of the statute prohibiting it. It can have no greater force in enlarging the jurisdiction of equity to appoint receivers, which we held in Wager v. Stone, 36 Mich. 364, had been abolished. Any such attempt to create a forfeiture is contrary to equity and equity will not enforce it. The same principle which makes all original agreements void which destroy the equity of redemption in advance must cover a partial as well as a complete destruction. * * * If mortgagees can evade the law by requiring

[19] 13 Pac. Rep. 375. But the Montana statute provides that "a mortgage of realty shall not be deemed a conveyance whatever its terms, so as to enable the mortgagee to recover possession without foreclosure." Code Civil Procedure, 359.

[20] Fee v. Swingly (Mont.), 13 Pac. Rep. 375; Cook v. Cooper (Oreg.), 22 Pac. Rep. 945; Roberts v. Sutherlin, 4 Oreg. 219; Longfellow v. Fisher (Minn.), 72 N. W. Rep. 118; Pace v. Chaderton, 4 Minn. 499; Anderson v. Trust Co., 71 N. W. Rep. 665.

[21] Cummings v. Cummings, 17 Pac. Rep. 442; Murdoch v. Clark, 27 Pac. Rep. 280; Booth v. Hoskins, 17 Pac. Rep. 225; Bosse v. Johnson, 73 Tex. 608; Hannay v. Thompson, 14 Tex. 144; Calhoun v. Lumpkin, 60 Tex. 190; Hudson v. Wilkinson, 61 Tex. 607; Burges v. Millikan, 50 Tex. 397; Morrow v. Morgan, 48 Tex. 304; Gillett v. Eaton, 6 Wis. 33; Hennessy v. Farrell, 20 Wis. 46; Spect v. Spect, 32 Kan. 736; Wells v. Rice, 34 Ark. 346; Brown v. Smith, 116 Mass. 109; Holt v. Ress, 44 Ill. 30; Kilgour v. Crockley, 83 Ill. 111.

[22] Morgan v. Wood, 48 Tex. 304; Johnson v. Real Estate Assn., 2 Civ. App. 494; American Bridge Co. v. Hidelbach, 94 U. S. 798; Gilman v. Ill. Tel. Co., 91 U. S. 603; Warren v. Raymond, 12 S. Car. 9; R. R. Co. v. Sup. Ct. of San Francisco, 55 Cal. 453; McLane v. R. R. Co., 66 Cal. 606; Shepley v. R. R. Co., 55 Me. 395.

[23] Bowen v. Brogan, 5 D. L. N. 775; Humphry v. Hurd, 29 Mich. 43; Newton v. McKay, 30 Mich. 380; Sherrid v. Southwick, 43 Mich. 515; Pierce v. Grimley, 77 Mich. 273; Reading v. Waterman, 46 Mich. 109; Morse v. Byam, 55 Mich. 598 9.

[24] 44 Mich. 503.

a forfeiture of something a little less than the entire freehold, but nevertheless covering its usufruct, the beneficial effect of the modern legislation, and to a considerable extent of the previous equitable doctrine, will be wiped out. The order appointing a receiver must be reversed with costs. * * * If the receiver has got into possession it must be restored and all rents repaid without any deduction." It will be observed that the stipulation was regarded by the court as providing for a partial destruction of the right of redemption, and it is clearly intimated that the maxim "once a mortgage always a mortgage" forbids a partial as well as a total destruction of that right. But in applying this maxim to a stipulation providing for possession upon the mortgagor's default it is believed that the case of Hazeltine v. Granger is unique. It would seem that a stipulation for possession upon default, although it might be oppressive to the mortgagor and make payment of the debt by him more difficult, yet so long as the rents exceeded the interest possession would afford a specific means for redeeming, and it is surely a little far fetched to speak of it as "a partial destruction of the right to redeem."

Other Michigan Cases.—But the authority of Hazeltine v. Granger has not been recognized by the Michigan court in several subsequent decisions. In Michigan Trust Co. v. Lansing Lumber Co.[25] the mortgage was given to the complainant to secure third parties, creditors of defendant, and provided that upon certain contingencies the complainant as trustee should have the right to take possession of the mortgaged premises "and operate and manage the same, making from time to time all needful repairs," etc., and after deducting the expense of such repairs to apply the proceeds to the payment of the debt. The bill alleged the happening of the specified contingencies and prayed for the appointment of a receiver. The court found that the contingencies had not arisen, yet intimated, though somewhat reluctantly, that if the contingencies had arisen the stipulation would have been enforced. The opinion contains the following language: "It has never been the policy of our law to divest the mortgagor of possession until foreclosure, and the expiration of the period of redemption, and while we think it within the power of the parties to stipulate that such possession and management may precede foreclosure, and that in such case a court of equity may enforce specifically such an engagement, * * * yet such power should be exercised with a full recognition of the settled policy of this State, and should not be exercised except in a case where the right is clearly given by the engagement of the party." In Belding v. Meloche[26] the complainant had sold the premises to defendants upon an executory contract. The bill was filed to foreclose the interest of the latter and for the appointment of a receiver to receive the rents and profits during the foreclosure proceedings. The court upheld the appointment, intimating that the statute which had given the mortgagor the right to possession until after foreclosure did not in terms apply to equitable mortgages. Kelly v. Bowerman[27] is another case which seems to detract from the authority of Hazeltine v. Granger. The report of the case is unsatisfactory, and unless we take the propositions set forth in the syllabus as a correct statement of the legal points raised and determined it is difficult to say what the case does decide. The following propositions are taken from the syllabus: "An assignment of rents of mortgaged property, to be received by the mortgagee and applied upon the mortgage, is valid. A decree entered by consent in a foreclosure suit adjudging that the mortgagee has been and is in possession and is entitled to the possession and control of the premises and empowered to collect all rents is a concession by the mortgagor that the mortgagee is entitled to the rents, which is binding upon the mortgagor's administrator." But in Union St. R. R. Co. v. City of Saginaw[28] the case of Hazeltine v. Granger was referred to with approval. The circuit court had made an order appointing "a receiver with power to borrow money for the purpose of preserving the property as security for the indebtedness to the mortgagee. On appeal the supreme court held that it was competent to appoint a receiver for the purpose mentioned, at the same time declaring that if the effect "of the appointment of a receiver was to divest the mortgagor of posses-

[25] 103 Mich. 392.

[26] 113 Mich. 223.

[27] 113 Mich. 446.

[28] 115 Mich. 300. See also Fifth Nat. Bank v. Pierce, 75 N. W. Rep, 1058.

sion and apply the rents and profits to the payment of the mortgage, the action was unauthorized," citing Hazeltine v. Granger.

Charlotte, Mich. W. A. COUTTS.

MASTER AND SERVANT—FELLOW-SERVANTS —INCOMPETENT SERVANT.

BROWN v. LEVY.

Court of Appeals of Kentucky, March 29, 1900.

The master is liable for an injury to a servant by the negligence of a fellow-servant where he had, before the injury, upon a complaint as to the incompetency of the negligent servant, promised the injured servant to put in his place a competent workman, provided such a time had not elapsed after the promise as to preclude all reasonable expectation that it would be kept.

WHITE, J.: The appellant brought this action for damages for personal injuries received while in the employ of appellees. It is charged in the petition that appellant was employed to overhaul and repair the elevator in use in appellee's building, and in such employment it was necessary for appellant to have an assistant; that appellees employed as such assistant one Neece; and that by reason of the carelessness and negligence of Neece, while he and appellant were engaged in the repair of the elevator, appellant was injured, and for that injury a recovery is sought. It is alleged as a ground of recovery that in selecting and employing the assistant, Neece, appellees failed to exercise ordinary or any care, and that appellees knew when Neece was employed that he was careless and negligent, yet employed him, and for this negligence in the employment of Neece appellees were liable. To this petition a demurrer was sustained. Appellant filed an amendment, in which it was pleaded "that a short time before his injuries in his petition set out, becoming aware of said Harry Neece's unfitness and incompetency, he (plaintiff) complained thereof to the defendants, gave them express notice of said Neece's unfitness and incompetency for said employment, and said defendants then and there promised this plaintiff that they would in a short time thereafter remove said Neece, and associate with plaintiff in their said service a competent and skilled workman. Plaintiff says that he relied upon the promise and assurance so given to him by the defendants, and so remained in their service, in reliance upon their said promise and agreement, at the time of his injury in his petition complained of." The amendment then reiterates the allegation that he was injured by the negligence of Neece, and seeks a recovery because of the negligence of appellees in retaining Neece after the notice and promise above. To the petition as amended a demurrer was sustained, and the petition dismissed. From that judgment this appeal is prosecuted. In Wood, Mast. & Serv., § 420, it is said: "Negligence on the part of the master is not to be presumed from the negligence of the servant, but, in order to render him liable for injuries sustained by one servant from the negligence of another, some sort of negligence on the part of the master, either in the employment or *retention* of the servant must be shown." (Italics ours.) Again, section 423: "The employee must be incompetent, and the master guilty of negligence in his employment or *retention* (italics ours), or no liability can be predicated of his acts; and the same is true if the servant injured has the same knowledge, or means of knowledge, of his unskillfulness as the master has." In Shear. & R. Neg. (5th Ed.) § 215, it is said: "There is no longer any doubt that, where a master has expressly promised to repair a defect, the servant does not assume the risk of an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept. *And the same principle applies to a case where the master promises to a servant to discharge an incompetent fellow-servant, but fails to do so, and the former servant is thereby injured*, or where a servant, apprehending a particular danger, makes it known to the master, who assures him he will provide against it." (Italics ours.) The rule as to defective appliances, as stated by Shearman & Redfield, has repeatedly been recognized by this court. Breckinridge Co. v. Hicks, 94 Ky. 362, 22 S. W. Rep. 554, and cases there cited. The reason of the rule is that while the employee is held to assume the ordinary risks and hazards of the business in which he is engaged, and this includes ordinary breakages or mishaps, where a defect is known to the employer, and a promise is given to the employee to remedy the defect, for the time being—a reasonable time—the employer is to be held to have assumed special responsibility for that defect, and, if injury is caused thereby, the employer will be liable; for this is not one of the risks assumed by the servant, but was especially assumed by the master. We are of opinion that the same rule applies to the negligence of a fellow-servant. A servant ordinarily assumes the risks of the negligence of a fellow, but when the attentions of the master is called to such negligence, and complaint is made, and the master promises to replace the negligent servant, for the time being—a reasonable time—the master assumes the risk of an injury by reason of the negligence of that servant. A servant cannot be held to assume the risk of injury by the negligence of a fellow-servant after a complaint of that very thing, and after a promise by the master to remedy the matter or remove the servant, unless the servant complaining were to continue at work with such incompetent servant after such time as would preclude all reasonable expectation that the master's promise would be kept. We

are of opinion that the petition as amended states a cause of action under this rule of law. The demurrer thereto should have been overruled. Judgment reversed, and cause remanded for proceedings consistent herewith.

NOTE.—*Recent Cases on Liability of Master for Injuries to Servant Caused by Incompetent Fellow-Servant.*—The duty of a master to exercise due care in selecting and retaining his employees, proportioned to the consequences that may result from negligence of such employees, is one of the personal obligations of the master to the servant of which he cannot rid himself by delegating it to an agent, and such obligation is not fully discharged by inquiring into an applicant's fitness at the time of employing him, but it requires the master to exercise a proper supervision over the employees' work, and thereby to keep himself advised of their continued fitness. Baltimore & O. R. Co. v. Henthorne, 73 Fed. Rep. 634, 19 C. C. A. 623. The master's duty to his servants, in the employment of fellow-servants, is to use all ordinary care in the selection and retention of competent men. Lewis v. Emery (Mich.), 69 N. W. Rep. 569. A master is not an insurer of the competency of fellow-servants, but is merely required to exercise reasonable care in selecting them. San Antonio & A. P. Ry. Co. v. Taylor (Tex. Civ. App.), 35 S. W. Rep. 855. In an action for personal injuries received while blasting rock, it was error to refuse to charge that there was no evidence of negligence in the selection of a superintendent or workmen employed on the work, where the only testimony on that point was given by the superintendent, who stated that, though he had never had charge of dynamite blasting, he knew how it ought to be done. O'Neil v. O'Leary, 164 Mass. 387, 41 N. E. Rep. 662. Evidence that plaintiff told one of defendant's officers that the man in charge of the boiler was incompetent is insufficient to show that he was incompetent, and that he was retained in defendant's employ with knowledge of his incompetency. Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228, 37 W. N. C. 544, 33 Atl. Rep. 1104. It is sufficient, to charge a railway company with knowledge of the incompetency of an employee, that notice of such incompetency should be given to such officers of the company who supervise such employee's work, and are given authority to suspend him temporarily from his position, for incompetency of the kind in question, and it cannot be required that notice of such incompetency should be brought home to those superior officers of the company who alone are entitled finally to discharge the employee. Baltimore & O. R. Co. v. Henthorne, 73 Fed. Rep. 634, 19 C. C. A. 623. The master cannot screen himself from liability on the ground that he did not know of the incompetency of the servant whose negligence caused injury to his fellow-servant, if he might have known it by the exercise of reasonable care and caution. Pope Glucose Co. v. Byrne, 60 Ill. App. 17. In an action against a railroad company for damages for personal injuries sustained by an employee of the company in an accident which some of the evidence tends to show was caused by the drunken condition of the engineer of the train, it is entirely competent to prove the engineer's general reputation for drunkenness and consequent incompetency, for the purpose of showing that the railroad company was negligent in retaining him in his employ. Baltimore & O. R. Co. v. Henthorne, 73 Fed. Rep. 634, 19 C. C. A. 623. In an action against an employer for injury resulting from the incompetency of a fellow servant, where it is shown that defendant exercised ordinary care in the selection of such servant, plaintiff cannot recover merely on proof of his reputation for recklessness and carelessness, without also proving that he was in fact reckless and careless. Gier v. Los Angeles Consolidated Electric Ry. Co., 108 Cal. 129, 41 Pac. Rep. 22. The general reputation of an incompetent servant among his fellow servants for incompetency is not alone sufficient to charge an employee, injured by reason of said incompetency, with knowledge thereof. Texas & P. Ry. Co. v. Johnson (Tex. Sup.), 35 S. W. Rep. 1042. General reputation of an incompetent servant among his fellow servants for incompetency is sufficient to charge the master with knowledge of his unfitness. Texas & P. Ry. Co. v. Johnson (Tex. Sup.), 35 S. W. Rep. 1042. To render a master liable for the injuries to a servant caused by the negligence of a fellow-servant, the servant must show both the incompetency of such fellow servant, and negligence on the part of the master in either employing or failing to discharge him. Kindell v. Hall (Colo. App.), 44 Pac. Rep. 781. Where a master knowingly retained a careless and negligent servant, as a result of whose subsequent negligence a co servant was injured, the master was liable for the injuries. Smith v. E. W. Buckus Lumber Co. (Minn.), 67 N. W. Rep. 358. An employer is liable for injury to an employee, caused by the incompetency of a co employee whom the employer, with knowledge of his incompetency, retains in his service, if such incompetency was not known to the person injured. Texas & P. Ry. Co. v. Johnson (Tex. Sup.), 35 S. W. Rep. 1042. An employer is liable for an injury caused by the incompetency of a co-employee where the employer knew of the incompetency, or by the use of ordinary caution might have known of it. Murphy v. Hughes (Del.), 40 Atl. Rep. 187. Where the evidence showed that the general reputation of a gripman, was that he was incompetent, and that shortly after he was employed he had an accident, and the foreman recommended his discharge, the question as to whether the company had notice of his incompetency was for the jury. Morrow v. St. Paul City Ry. Co. (Minn.), 73 N. W. Rep. 973. A railroad company sued for injury to a brakeman through negligence of an engineer cannot complain of an instruction that, to charge it with an employee's knowledge of his incompetency, such employee must have been empowered to discharge the engineer. East Tennessee, V. & G. R. Co. v. Wright (Tenn.), 42 S. W. Rep. 1065. Knowledge acquired by a conductor, while in charge of a train, touching the recklessness and misconduct of his engineer, is notice to the railroad company, though the conductor is not empowered to discharge the engineer. East Tennessee, V. G. & R. Co. v. Wright (Tenn.), 42 S. W. Rep. 1065. A master who negligently retains a servant known to be careless in obeying rules in prohibiting him from interfering with appliances not connected with his work is liable for injury to a fellow servant resulting from such disobedience, though the servant causing the injury may be competent as to the duties required of him. Maitland v. Gilbert Paper Co. (Wis.), 72 N. W. Rep. 1124. It is error to permit a witness to testify, for the purpose of showing the incompetency of a servant, that, 10 years before the occurrence to which the suit relates, the witness had heard him spoken of as "Crazy B." Park v. New York Cent. & H. R. R. Co., 155 N. Y. 215, 49 N. E. Rep. 674. The incompetency of an employee for whose negligence it is sought to hold his employer responsible cannot be shown by proving his

general reputation for carelessness, from the speech of people, though it may be shown by proving specific acts of the servant, and that the master knew or should have known of such incompetency. Park v. New York Cent. & H. R. R. Co., 155 N. Y. 215, 49 N. E. Rep. 674. An employer cannot escape liability for injuries to an employee caused by an incompetent fellow workman by delegating to an agent authority to select the workman. Murphy v. Hughes (Del.), 40 Atl. Rep. 187. Where one employed as a common laborer, while temporarily acting as foreman, sends a fellow workman to do other work for which he is incompetent, and another co employee is injured as a result of such incompetency, the principal is not liable for negligently employing incompetent servants. McManus v. Staples (Mass.), 50 N. E. Rep. 537. The fellow servant rule has no application if the master negligently retains in his service an incompetent or careless servant, who by his negligence injures another servant having no notice of such incompetency or carelessness. Jenson v. Great Northern Ry. Co. (Minn.), 75 N. W. Rep. 3. If a master knowingly employs or retains in his service an unskilled or incompetent workman, he is responsible for injuries received by an employee through the unskillfulness or incompetency of such workman. Chandler v. Atlantic Coast Electric Ry. Co. (N. J. Sup.), 39 Atl. Rep. 674. The employment of an incompetent servant does not render the master liable to a fellow-servant for an injury caused by some negligent act of such servant, unless the injury is the result of such incompetence. Kliefoth v. Northwestern Iron Co. (Wis.), 74 N. W. Rep. 356. An employer is liable for an injury resulting from the employment of an incompetent co-employee, though he had once been competent, and his incompetency was due to lack of practice. Curran v. A. H. Stange Co. (Wis.), 74 N. W. Rep. 377. It is the duty of the master to use all reasonable care to employ competent and prudent co employees. Webster Mfg. Co. v. Schmidt, 77 Ill. App. 49. The incompetency of a railroad employee cannot be shown by a single act of carelessness or recklessness. Galveston, H. & S. A. Ry. Co. v. Davis (Tex.), 48 S. W. Rep. 570. The fact that an officer of the defendant railroad testified in an action for injury to an employee that, if an alleged incompetent conductor was an habitual drunkard, he had no business on its train, does not establish negligence of the company in employing him, since incompetency need not follow his being an habitual drunkard, he not being shown to be drunk at the time of the accident. Galveston, H. & S. A. Ry. Co. v. Davis (Tex.), 48 S. W. Rep. 570. In an action for injury, predicated on the negligence of a railroad in employing an incompetent conductor, the fact that the rules of the company strictly forbade drinking did not make it negligent in employing a drinking man. Galveston, H. & S. A. Ry. Co. v. Davis (Tex), 48 S W. Rep. 570. A master may be liable to a servant if he employs an incompetent fellow-servant, though the latter be not negligent in the performance of his duties. Nofsinger v. Goldman (Cal.), 55 Pac. Rep. 425. Where the death of a fireman was caused by an accident which would not have happened but for the negligence of a switchman, and the railroad company had notice thereof, it is liable though the engineer with whom deceased was working was also negligent. Wood v. New York Cent. & H. R. R. Co., 53 N. Y. S. 163, 32 App. Div. 606.

JETSAM AND FLOTSAM.

CUSTODY OF INFANTS.

The recent case of *In re* Minors of Charles and Anna Luck, Weekly Law Bulletin, Feb. 19, 1900, illustrates the modern attitude of the law as to the custody of young children. There Charles and Anna Luck before their marriage agreed that children of the union should be trained in the religious faith of the mother. After the mother's death the two infant children were taken by relatives of the father who entertained his religious belief. Four years later the father died. Applications for guardianship were then made by relatives of both the father and the mother, representing opposing beliefs. It was held that the relatives of the father should keep the children. Notwithstanding the agreement, the four-year period of training with the father's relatives had created attachments it was not wise to break. The case goes squarely upon the modern view that in questions of custody the welfare of the child is the paramount consideration.

Such, however, has not always been the attitude of the courts. An examination of the Roman law reveals that no such idea could be entertained. The child was then more nearly a species of property. 8 Harvard Law Review, 39. The development of the English law, however, shows the gradual growth of the idea that justice might demand a consideration of the welfare of the child in granting its custody. There was both a chancery and a common law jurisdiction in these matters. Queen v. Gynzall (1893), 2 Q. B. 232. From early times the former was exercised in accordance with the theory of the rights of the crown over its subjects. Hence it often assumed the right to act as the welfare of the child demanded. But a harsher doctrine appeared in the common law court in proceedings on the writ of *habeas corpus*. Here it was said that the father had a right to the custody of the child. Rex v. Greenhill, 6 Nev. & Man. 244. Accordingly, the child was given to him even when it might seem wiser to have given it to another. The continued refusal of the courts to exercise a discretion in the matter was finally met by the passage of the Talfourd Act, 2 & 3 Vict. ch. 54, which expressly allowed the court of chancery, in its discretion, to give the mother access to the children in custody of the father, and further to give custody of infants under seven to the mother. This age was later increased to fourteen years. Now, by 36 & 37 Vict. ch. 66, the rules of equity in relation to the custody of infants are to prevail in the common law courts. By the present English law there is thus a recognition of the interest of the child, but one still sees a tendency to regard the right of the father as controlling, and the cases therefore are not always free from technicalities. Hochheimer, Custody of Infants, 2d Ed. p. 33. The American cases seem never to have held with such strictness to the idea of the father's paramount right. Schouler, Domestic Relations (5th Ed.), § 248. That right has been recognized, but at the same time the broader view has been taken that the child has rights of its own which the court may protect to subserve the present and future interests of the infant. United States v. Green, 3 Mass. 482. This idea that the child is but a young citizen entitled to all the advantages possible to secure to it is the most advanced which the cases have presented, and the principal case is clearly right in declaring that the welfare of the child itself is the important factor in determining its custody.—*Harvard Law Review.*

BOOK REVIEWS.

PROBATE REPORTS ANNOTATED, VOL. 4.

We have heretofore noticed the previous three volumes of these reports in this journal. Volume 3 was issued about one year ago. The present volume opens with the interesting opinion of Smithsonian Institute v. Meech *et al.*, in the Supreme Court of the United States, deciding that "where it is established that the consideration for property conveyed to a wife was paid by her husband, no arbitrary rule exists as to the amount or kind of evidence required to overcome the presumption of fact, that the conveyance was intended as a provision for the benefit of the wife alone; and satisfactory proof of a contemporaneous agreement that the wife should, by will, dispose of the property after her death in a certain manner, is sufficient to raise a resulting trust in favor of the husband." The case of State to use of Bank of Wayne N. C., v. Fulton *et al.*, Court of Chancery Appeals of Tennessee, deciding that "where an administrator takes out letters on his intestate's estate in different States, such letters have no extraterritorial force outside the State in which they are issued; and hence a creditor of the estate after recovering judgment against such administrator in one State, cannot proceed against him on such judgment in another State, where he also took out letters for a *devastavit* committed in the latter State." This case has an elaborate annotation of six pages. The liability of executor for acts of co executor is discussed in an annotation to case of *In re* Myers' Estate, Supreme Court of Pennsylvania. The subject of attachment or garnishment of executors and administrators is carefully considered in an annotation to case of Merriam *et al.* v. Wagener, Supreme Court of Minnesota. An interesting case with annotation on the power of sale of real estate by executor, by the Supreme Court of Illinois, in suit of Staff *et al.* v. McGinn. An annotation on compromise by executors and administrators, is attached to case of Pullin's Administrator v. Smith, decided by Court of Appeals of Kentucky. These cases have been selected, and annotations to them made by George A. Clement, of the New York Bar, who is the author of Clement's Digest of Fire Insurance decisions. The volume contains 88 cases in full, 25 of them reinforced by well considered annotations by Mr. Clement. The book contains 800 pages, 46 pages of which are devoted to a well constructed index. The book is produced in the usual good style of the publishers, Baker, Voorhis & Co., 66 Nassau St. New York.

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1. ACCIDENT INSURANCE—Total Disability — Instructions.—In an action on an accident policy indemnifying assured against accidents immediately, continuously, and wholly disabling and preventing him from performing any and every kind of duty pertaining to his occupation, an instruction to find for plaintiff if the injury disabled and prevented him from performing any and every kind of duty essential to his occupation in a manner "reasonably as effective" as he could have performed it if not injured, was erroneous.—FIDELITY & CASUALTY CO. OF NEW YORK v. GETZENDANNER, Tex., 56 S. W. Rep. 326.

2. ADMINISTRATION — Executors — Resignation.—Under Rev. St. 1895, art. 2030, requiring that the resignation of an executor shall be presented to the court in which the administration of the estate is pending, the judge of a district court has no power to accept such a resignation, since estates must be administered in the county court.—WELLS v. HOUSTON, Tex., 56 S. W. Rep. 233.

3. ADMIRALTY—Maritime Liens—Equipment.—Under 2 Ballinger's Ann. Codes & St. Wash. § 5953, which gives a lien on a vessel for equipment furnished in that State at the request of her owner, master, or agent, and provides that every person "having charge in whole or in part of the equipment of any vessel shall be held to be the agent of the owner," one who furnished necessary equipment for a steamer at the request of the agent of a corporation claiming to be a part owner, and which was in possession under a contract for her operation on joint account, by the terms of which the corporation was to become the owner when the owner's share of the earnings reached a specified sum, is entitled to a lien therefor, which may be enforced in admiralty, where it was expressly agreed that credit was given to the vessel.—THE SOUTH PORTLAND, U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 494.

4. ADMIRALTY—Maritime Liens—Supplies — Effect of Charter.—The terms of a time charter of a steamer contained provisions indicating that the venture was to some extent a joint one between the owner and charterers. The owner, who was a member of a firm of shipping agents, was to sell the tickets for passage on the contemplated voyages, and his firm were advertised as agents for the vessel. The office of the charterers was also with such firm, with nothing to indicate that the business was separate. Held, that one furnishing to the vessel necessary supplies for the voyage on the order of the master, without either actual or constructive notice of the charter, was entitled to a lien on the vessel therefor, although by the terms of the charter such expenses were to be paid by the charterer.—THE NORTH PACIFIC, U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 490.

5. ADMIRALTY — Maritime Liens—Supplies Furnished on Contract with Owner.—By the maritime law no lien for labor or supplies furnished a vessel is presumed to arise on a contract made with the owner, and to create a lien in such case an agreement or mutual understanding to that effect is necessary, and must be proved; and the rule is not different where the person contracted with is known to be a partner in the firm which owns the vessel, because he is also acting in the capacity of master, it being within the power of the person furnishing the labor or supplies to require an agreement for a lien, if he intends to rely upon the credit of the vessel.—THE SARATOGA, U. S. D. C., D. (R. I.), 100 Fed. Rep. 480.

6. ADVERSE POSSESSION — Presumption of Grant.—That there may be a presumption, under Code, § 139, of a grant from the State, by adverse possession for 21 years, the possession need not be continuous or by the same parties, or immediately preceding suit for the land, but it is enough that the periods of holdings by the different parties amount to 21 years.—LEWIS v. OVERBY, N. Car., 35 S. E. Rep. 623.

7. APPEAL—Assignment of Error.—Where, on appeal from a judgment on a petition for drainage, the petitioners, who appeared from the record to have been parties to the judgment, and adverse to appellants, were not named as appellees in the assignment of errors, the appeal will be dismissed.—EX PARTE SULLIVAN, Ind., 56 N. E. Rep. 911.

8. APPEAL AND ERROR—Motion — Copy—Record.—Where a motion for judgment on the answers of the jury to interrogatories was in writing, and a copy thereof was not made a part of the record on appeal, the action of the trial court overruling it will be sustained, since the motion may have contained something making such action proper, which does not appear on appeal, on account of the absence of the copy.—LAKE ERIE & W. R. CO. v. JUDAY, Ind., 56 N. E. Rep. 931.

9. ARBITRATION AND AWARD—Submission—Evidence.—Where the issues, by agreement of parties and order of court, were submitted to the adjudication of commissioners, there was no error in refusing a nonsuit after report of such commissioners, since Rev. St. 1899, § 639, provides that nonsuit shall not be allowed after submission of a suit to the court sitting as a jury, and such commissioners became, as to the issues submitted to them, the court sitting as a jury.—ALLEN v. HICKAM, Mo., 56 S. W. Rep. 809.

10. ASSAULT AND BATTERY — Justification.—Justification for an assault cannot be urged as a defense under a plea of not guilty in an action for damages.—ILLINOIS STEEL CO. v. NOVAK, Ill., 56 N. E. Rep. 966.

11. BANKRUPTCY—Adjudication—Time to Appear and Plead.—On a petition in involuntary bankruptcy against a corporation, there can be no adjudication, or reference of the case by the clerk to the referee, on a written admission by the respondent of the acts of bankruptcy charged, and a waiver of service and of the time for appearance. Since creditors, as well as the alleged bankrupt, have the right to appear and plead to the petition within 10 days after the return day, that day must be fixed by the issuance of a subpœna, and the case must remain in the clerk's office until the 10 days have expired.—IN RE L. HUMBERT CO., U. S. D. C., N. D. (Iowa), 100 Fed. Rep. 439.

12. BANKRUPTCY — Application for Discharge—Time of Filing.—Under Bankr. Act 1898, § 14a, after the expiration of a year from the date of his adjudication a bankrupt has no absolute right to apply for a discharge, but may be allowed to do so within the next six months, by an order of court, based on a petition to the judge for leave to file such application, accompanied by satisfactory evidence that the bankrupt was unavoidably prevented from making his application within the year.—IN RE WOLFF, U. S. D. C., N. D. (Cal.), 100 Fed. Rep. 430.

13. BANKRUPTCY — Assets in Bankruptcy — Property Fraudulently Conveyed.—Under Bankr. Act 1898, § 70, subd. 4, providing that a trustee in bankruptcy shall be vested by operation of law with the title of the bankrupt to all "property transferred by him in fraud of his creditors," such trustee is entitled to avail himself, in like manner as any judgment creditor, of a decree of a State court declaring certain transfers and conveyances of the debtor to have been fraudulent and void, and may claim the property affected, as assets of the estate in bankruptcy, subject to any valid liens or charges against it.—IN RE LESSER, U. S. D. C., S. D. (N. Y.), 100 Fed. Rep. 433.

14. BANKRUPTCY—Effect of Bankruptcy Discharge on Debt Created by Fraud.—Obtaining advances of money by false and fraudulent representations that the borrower has a certain quantity of wood cut, piled, and ready for shipment, and a sale of which has already been contracted at a certain price, creates a debt by means of fraud involving moral turpitude and intentional wrong, that is exempt from the effect of a discharge in bankruptcy under the bankrupt act of 1867.—FORSYTH v. VEHMEYER, U. S. S. C., 20 Sup. Ct. Rep. 623.

15. BANKRUPTCY — Exemptions — Demand of Indemnity.—A trustee in bankruptcy has no right to demand from the bankrupt, as a condition upon his delivering to him the property claimed as exempt and appraised for that purpose, a bond of indemnity, and where, upon demand and refusal of such a bond, the trustee sells the property in question, the bankrupt may claim the amount of his exemptions from the proceeds.—IN RE BROWN, U. S. D. C., W. D. (Penn.), 100 Fed. Rep. 441.

16. BANKRUPTCY—Involuntary Bankruptcy—Trial by Jury.—In the case of a petition in involuntary bankruptcy, alleging as an act of bankruptcy the making of a general assignment for the creditors, where the defense set up by the debtor is that the petitioning creditors are estopped, by their conduct with reference to the assignment, to maintain a petition based thereon, he is not entitled to a trial by jury; and consequently an appeal from the order adjudging the defendant bankrupt may be treated as an appeal in equity would be treated, and the appellate court may review the facts as well as the law of the case.—SIMONSON v. SINSHEIMER, U. S. C. C. of App., Sixth Circuit, 100 Fed. Rep. 426.

17. BANKRUPTCY—Trustee—Appointment by Referee.—If the creditors of a bankrupt, at their first meeting, do not choose a trustee for the estate, nor request that an election be had, nor nominate a candidate for the office, the referee in bankruptcy, presiding at the meeting, may appoint a trustee; and his appointment will not be set aside by the court merely because the creditors desire that a different person should act as trustee.—IN RE BROOKE, U. S. D. C., E. D. (Penn.), 100 Fed. Rep. 482.

18. BENEVOLENT SOCIETY—Insurance — Forfeiture.—The failure of the secretary of a local, subordinate branch or section of the Knights of Pythias, to transmit to the general board of control, within the time specified by the general laws of said order, moneys paid to him in due time by a member, will not be ground for forfeiture of the policy of such member, since the secretary's negligence is not chargeable to the member, but is that of an agent of the order, notwithstanding a provision in the general laws of the order to the effect that he is to be regarded as the agent of the member, and not of the order, where the general laws also required the member to pay dues to such secretary only, and provide that the secretary shall transmit immediately after the 10th of each month all moneys collected by him, and that the local branch shall be responsible to the board of control for all such moneys collected by the secretary.—SUPREME LODGE KNIGHTS OF PYTHIAS v. WITHERS, U. S. S. C., 20 Sup. Ct. Rep. 612.

19. BENEVOLENT SOCIETY — Insurance—Vested Interests.—Where a certificate of membership is issued by a beneficial association, the constitution enters into and becomes a part thereof, and a member has no absolute legal right to change the beneficiaries but in the explicit manner pointed out by such instrument.—SHUMAN v. ANCIENT ORDER OF UNITED WORKMEN, Iowa, 82 N. W. Rep. 331.

20. BILLS OF SALE — Chattel Mortgages.—An instrument described as a bill of sale conveying chattels is a mortgage, within 2 Sayles' Civ. St. art. 3328, requiring chattel mortgages to be registered, to be valid as against the mortgagor's execution creditors, where it provides that it is to be void on repayment of the consideration within a certain time, though it provides that the sale is to become absolute and the title is to pass, without any legal process, on the seller's failure to make such repayment.—WILLIAMS v. FARMERS' NAT. BANK, Tex., 56 S. W. Rep. 261.

21. BOUNDARIES—Possession.—One in actual possession of any part of an entire tract, as shown by the deed under which he claims, has constructive possession co-extensive with the boundaries designated in his deed.—BOGGESS v. ALLEN, Tex., 56 S. W. Rep. 195.

22. CARRIERS OF GOODS — Penalties — Excessive Charges.—Sand. & H. Dig. § 6254, making it unlawful

for a railroad to collect from a consignee of freight more for transportation "than is specified in the bill of lading," and declaring a penalty for refusing to deliver on tender of the amount specified, does not apply where goods were shipped from L, consigned to G at H, via R, but the bill of lading only stated the charges from L to R, and the connecting line at R, which was not a party to the bill of lading, accepted the shipment from the original carrier, and paid it the amount of charges claimed by it, without knowing that they were more than the bill of lading specified, and then refused to deliver to consignee, except on payment of its charges and those it had paid the original carrier.—ST. LOUIS, I. M. & S. RY. CO. v. GIBSON, Ark., 56 S. W. Rep. 268.

23. CARRIER OF GOODS—Refusal to Switch Freight.—Under Rev. St. art. 4535, requiring every railway company doing business in the State to receive all freight and passengers coming to it from a connecting line, and going to points on its line or beyond, and to transport the same to destination or the next connecting lines, and authorizing the collection of damages against a company which fails so to do, a railroad company is not compelled to switch freight which was not consigned over its lines from the line of one railroad to that of another in the same city, and is not required to respond in damages for a failure so to do.—GULF & I. RY. CO. OF TEXAS v. TEXAS & N. O. RY. CO., Tex., 56 S. W. Rep. 328.

24. CARRIERS OF PASSENGERS—Negligence—Proximate Cause.—A complaint in a single paragraph alleged that the plaintiff, a passenger attempting to board defendant's train, was frightened by the negligence of defendant in starting its train in such a manner as to endanger the life of her daughter in her presence, and in preventing her from getting on the train, and that the fright and shock, in connection with the worry caused by being left at the station, permanently injured her health. Held that, as the theory of the complaint, as determined from its leading allegation, was to recover for an injury caused by fright only, not connected with any physical injury to the plaintiff, the complaint failed to show that the negligence of the defendant was the proximate cause of the injury, and did not state a cause of action.—CLEVELAND, C., C. & ST. L. RY. CO. v. STEWART, Ind., 56 N. E. Rep. 917.

25. CONSTITUTIONAL LAW—Due Process of Law—Bringing in Defendant after Judgment.—The rendition of a judgment against one who was not served with process in the action or named as a party until after the original judgment was rendered, but was brought in subsequent thereto by an order to show cause, and condemned to pay the judgment, was not in violation of the provision as to due process of law in U. S. Const. 14th Amend., where such party had voluntarily appeared in the cause and actively conducted the defense.—LOUISVILLE & N. R. CO. v. SCHMIDT, U. S. S. C., 20 Sup. Ct. Rep. 620.

26. CONTRACT — Restraint of Trade — Physicians.—A contract not to engage in the practice of medicine within a certain territory, without specifying any time, is not invalid for uncertainty, since it is to be construed as enduring for the life of the promisor.—HAUSER v. HARDING, N. Car., 35 S. E. Rep. 586.

27. CONTRACTS—Validity — Wagering Agreements.—Contracts for the future delivery of a marketable commodity are not *per se* void or voidable, but are presumptively valid; and to render such a contract illegal, as a wagering contract, it must be shown that there was a mutual intention that the goods should not be delivered, but that the contract should be solved by the payment of the difference between the contract price and the market price at the time fixed for delivery.—PONDER v. JEROME HILL COTTON CO., U. S. C. C. of App., Eighth Circuit, 100 Fed. Rep. 878.

28. CONVERSION—Evidence.—Where it is agreed by plaintiff and defendant that money in defendant's hands, belonging one-half to each of them, shall be left with defendant, and used by him in prosecuting an appeal, there is a conversion thereof by defendant, by his dismissing the appeal and failing to account, which entitles plaintiff, without demand, to recover one-half thereof, in the absence of a showing by defendant that he had expended the money, or any part thereof, in prosecuting the appeal.—GREGORY v. MONTGOMERY, Tex., 56 S. W. Rep. 281.

29. CONVERSION—Parties.—Under Rev. St. art. 1194, the suit being brought in the county in which plaintiff and part of the defendants live, and the cause of action accrued, plea of privilege of other defendants, necessary or proper parties, to be sued in the county of their residence, is not good.—MIDDLETON v. PIPKIN, Tex., 56 S. W. Rep. 240.

30. CORPORATIONS — Officers' Liability—Guaranty.—Where the corporation of which defendant was president was resident within the jurisdiction, and defendant spent a large portion of his time, attending to his duties as its president, within the jurisdiction, and was actually served therein, the court had jurisdiction of defendant's person in an action to charge him personally with a debt of the corporation, though defendant's residence was in fact in another State.—CARTER v. FORBES LITHOGRAPH MFG. CO., Tex., 56 S. W. Rep. 227.

31. CRIMINAL EVIDENCE—Homicide.—On a trial of a husband for the murder of his wife, evidence of a continuous course of cruel treatment for five years previous to the homicide was admissible to show malice.—SPEARS v. STATE, Tex., 56 S. W. Rep. 347.

32. CRIMINAL EVIDENCE—Rape.—It is not error, in a prosecution for rape, to permit the prosecutrix to testify that she exhibited the underclothing worn by her at the time of the assault to the person to whom she made complaint.—STATE v. PETERSEN, Iowa, 82 N. W. Rep. 329.

33. CRIMINAL LAW — Embezzlement—Venue.—Where defendant, charged with embezzlement, obtained the property in R county, under a contract there made, by which he was to return the same or account therefor to the owner in that county, but the proceeds of the sale of the property were converted to the defendant's use in C and N counties, the venue was properly laid in R county, though the defendant might also have been prosecuted in C and N counties.—STATE v. CARTER, N. Car., 35 S. E. Rep. 391.

34. CRIMINAL LAW—Former Acquittal.—An acquittal under an indictment for stealing "three head of cattle" alleged to be the property of C is not a bar to an indictment for stealing three head of cattle alleged to be the property of B and W.—RIFFE v. COMMONWEALTH, Ky., 56 S. W. Rep. 265.

35. CRIMINAL LAW—Jury—Court's Remarks.—Remarks by a judge in the presence of a jury, who, after deliberation, had failed to agree, that he was going to put a stop to hung juries, and force them to agree, did not indicate how the court desired the jury to decide, and were not error.—CARLISLE v. STATE, Tex., 56 S. W. Rep. 365.

36. CRIMINAL LAW—New Trial—Separation of Jurors.—A juror in a criminal case left the balance of the jury for about five minutes, for the purpose of visiting a privy, and during said time was in view of the officer having charge of the jury, except a short time when in the privy, which was in sight. Held not to constitute such a separation of the jury as will constitute a ground for a new trial.—GRIFFEY v. STATE, Tex., 56 S. W. Rep. 325.

37. CRIMINAL LAW—Proof of Motive—Ill-Will.—The ill-will of defendant, indicted for burning property, toward the agent of the owner of the property, is inadmissible to prove a motive, in the absence of evidence of threats against the latter, or of any facts tending to show that defendant's ill-will had extended to the owner.—STATE v. BATTLE, N. Car., 35 S. E. Rep. 624.

38. CRIMINAL LAW—Seduction—Corroboration.—Mere proof of opportunity for seduction is not enough to

corroborate the testimony of the prosecuting witness.—STATE v. BURNS, Iowa, 82 N. W. Rep. 325.

39. CRIMINAL LAW—Witness—Impeachment.—Where a State's witness testified that defendant did not tell her to hide certain alleged stolen property, it is not error for the State, over defendant's objections, to show by the witness that she had previously stated to the prosecuting attorney that defendant had made such a request, where she admits that she did make such a statement to the prosecuting attorney, but says that it was not true, since such evidence is not impeachment by the State of its own witness.—BINYON v. STATE, Tex., 56 S. W. Rep. 339.

40. CRIMINAL PRACTICE—Rape.—Where, on a prosecution for rape, the affidavit and information named Laura V as the alleged victim, and on trial the only name proven was Lillie, the judgment on conviction should be reversed for failure of proof, since the name was an essential element in the legal description of the offense.—MCFARLAND v. STATE, Ind., 56 N. E. Rep. 910.

41. DEATH BY WRONGFUL ACT.—It is not error, in an action by parents to recover for the wrongful death of their son, to instruct that the measure of damages is the pecuniary loss resulting to the parents, when the instruction provides that in determining such loss the present and probable future earnings of deceased, his age and that of plaintiffs, the amount of his earnings which he contributed to their support, and the probable duration of such support, were to be considered.—HOUSTON & T. C. R. CO. v. WHITE, Tex., 56 S. W. Rep. 204.

42. DEATH BY WRONGFUL ACT—Carriers—Injury to Passenger.—1 Rev. St. 1893, §§ 2315, 2316, conferring the right of action for the death of a person through another's negligence, and providing that the jury shall assess damages proportionate to the injury, do not place such actions on a different basis from other actions in tort; hence the trial judge in such case had authority to grant a new trial on the ground that the verdict was excessive.—STUCKEY v. ATLANTIC COAST LINE R. CO. OF SOUTH CAROLINA, S. Car., 35 S. E. Rep. 550.

43. DEEDS—Condition Subsequent—Forfeiture.—The stipulation in a deed that if the grantee, or any person claiming under it, shall at any time use the land conveyed for any purpose other than a cotton press, or shall fail to keep its compress in good working condition, or shall in any way forfeit its charter or become insolvent, then the title and possession shall, without the necessity of reconveyance, *ipso facto* revert to the grantor, its successor and assigns, and the deed shall thereupon become null and void as against the grantor, creates a condition subsequent, under which no forfeiture of title for breach of the covenants referred to can arise until re-entry, or its equivalent, by the grantor, or some one holding under it, by title acquired subsequent to a breach of the condition.—HOUSTON & T. C. R. CO. v. ENNIS-CALVERT COMPRESS CO., Tex., 56 S. W. Rep. 367.

44. EMINENT DOMAIN—Exercise of Right by Telephone Company.—The telephone being a new species of telegraph, the right of eminent domain conferred on telegraph companies by Rev. St. 1895, tit. 21, ch. 7, is applicable to telephone companies, although the latter are not mentioned in the statute.—SAN ANTONIO & A. P. RY. CO. v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO., Tex., 56 S. W. Rep. 201.

45. EVIDENCE—Res Inter Alios Acta.—Where plaintiff agreed to dye defendant's goods in a skillful and satisfactory manner, and to pay any damage done, statements rendered defendant by his agent as to sales of the dyed goods, and allowances made thereon, were inadmissible to prove a counterclaim for defective work, since they were *res inter alios acta*.—DURHAM DYEING CO. v. GOLDEN BELT HOSIERY CO., N. Car., 35 S. E. Rep. 586.

46. EXECUTION—Levy and Condemnation of Land.—A levy of an execution from a justice's court on land, and a return of the execution and the justice's judgment and the papers in the case to the next term of the circuit court of the county, as required by Mill. & V. Code, § 3793, and a proper order of condemnation by that court at that term, fix a lien on the land superior to the rights of one purchasing it between the levy and the date of condemnation. Where an execution on real property was irregular in erroneously reciting the date of the judgment, but defendants in the execution took no steps to arrest it, the irregularity will not be permitted to prejudice the rights of third persons claiming under the sale or through the judgment plaintiff.—COURTLAND WAGON CO. v. SHIELDS, Tenn., 56 S. W. Rep. 275.

47. EXECUTIVE DEPARTMENTS—Discharge of Clerk—Review by Court.—The action of the secretary of the interior in discharging a clerk in his department for incompetency is not subject to review in the courts, either by *mandamus* to reinstate the clerk, or by compelling payment of salary as though he had not been removed, in the absence of any specific provision therefor by act of congress.—KEIM v. UNITED STATES, U. S. S. C., 20 Sup. Ct. Rep. 574.

48. FEDERAL COURTS—Jurisdiction—Suit by Assignee.—Municipal bonds payable to "——— or order" are, in legal effect, payable to bearer, and a transferee who is a citizen of another State, and to whom they were transferred in the same condition by delivery, may maintain an action thereon in a federal court, whether the original holder could have done so or not.—LYON COUNTY, IOWA, v. KEENE FIVE-CENT SAV. BANK, OF KEENE, N. H., U. S. C. C. of App., Eighth Circuit, 100 Fed. Rep. 337.

49. FEDERAL COURTS—Power to Order Surgical Examination of Party.—The power of a circuit court of the United States to order a surgical examination of the plaintiff in an action for damages for a personal injury, in accordance with the provisions of a statute of the State in which the court is sitting, there being no law of congress in conflict therewith, is conferred by U. S. Rev. Stat. § 721, providing that the laws of the States shall be rules of decision in trials at common law in courts of the United States, in cases in which they apply.—CAMDEN & SUBURBAN R. CO. v. STETSON, U. S. S. C., 20 Sup. Ct. Rep. 617.

50. FEDERAL COURTS—Writ of Error to State Court—Federal Question.—A stranger to a contract cannot raise the question of its impairment for the purpose of creating a federal question to give jurisdiction on writ of error from the Supreme Court of the United States to a State court.—PHINNEY v. TRUSTEES OF THE SHEPPARD AND ENOCH PRATT HOSPITAL, U. S. S. C., 20 Sup. Ct. Rep. 573.

51. FRAUD—Conspiracy—Circumstantial Evidence.—A conspiracy to defraud one of his real estate, by procuring him to exchange same for other property of little value, may be established by circumstantial evidence, though there be no direct evidence that the alleged confederates were such in fact.—HORTON v. LEE, Wis., 82 N. W. Rep. 360.

52. FRAUDULENT CONVEYANCES—Instructions.—Where it is sought to set aside a chattel mortgage as in fraud of creditors, an erroneous instruction that the facts and circumstances giving the mortgagee knowledge which would have placed a prudent man on inquiry which would have shown the fraudulent purpose of the mortgagor were not sufficient to make the mortgage invalid is not cured by another instruction that the mortgage would be invalid if the mortgagee knew or had information of the fraudulent purpose of the mortgagor, as the latter instruction required actual knowledge.—NATIONAL BANK OF COMMERCE OF KANSAS CITY v. BRUNSWICK TOBACCO WORKS CO., Mo., 56 S. W. Rep. 283.

53. HOMESTEAD—Pretended Sale by Husband and Wife—Estoppel.—Where a husband and wife make a pretended sale of their homestead, taking notes of the vendee for the price, which they negotiate to an innocent purchaser for value, they will be estopped from afterwards setting up the simulated character of the sale.—CAMPBELL v. CROWLEY, Tex., 56 S. W. Rep. 373.

54. HUSBAND AND WIFE—Liquor—Sale to Husband.—Where an attorney collects money on a judgment in a suit instituted by a wife and her husband against a saloon-keeper for the illegal sale of liquor to the husband, the payment thereof must be made to the wife, as the judgment is her separate property.—HAHN v. GOINGS, Tex., 56 S. W. Rep. 217.

55. HUSBAND AND WIFE—Necessaries—Wife's Separate Estate.—Code, § 1826, empowering a wife to make an agreement by which she can charge her separate estate for the support of her family, does not authorize a creditor who has sold her merchandise necessary for the support of her family to take possession of crops raised by her on her own land to satisfy his claim for such merchandise, but he must proceed to obtain judgment and issue execution, subject to her right of exemption.—RAWLINGS v. NEAL, N. Car., 35 S. E. Rep. 597.

56. INFANTS—Action.—Action by an infant by guardian *ad litem* does not abate by the infant coming of age pending it, but may, without any amendment, be continued by the infant electing to proceed with the action, and her election is sufficiently shown by the infant receiving the fruits of the judgment entered after she came of age.—CONNOR v. ASHLEY, S. Car., 35 S. E. Rep. 546.

57. INJUNCTION—Agreement to Discharge.—Where a complainant obtains an injunction against a defendant, and they then agree that it shall not be operative, and proceed as if there was no injunction, neither of them can afterwards insist in a court of equity that the injunction continued in force because the agreement was in parol.—COURTLAND WAGON CO. v. SHIELDS, Tenn., 56 S. W. Rep. 278.

58. INTOXICATING LIQUORS — Sale by Druggist.—Whether a compound sold by a druggist, composed in part of liquor and in part of a drug, was such as that the sale was in violation of law, was not a question of law for the court, but of fact for the jury.—STATE v. GREGORY, Iowa, 82 N. W. Rep. 335.

59. INSURANCE — Condition — Estoppel of Insurer.—Where an insurance solicitor obtains an application for insurance, which is accepted by an insurance company, and on which it writes a policy, and delivers it to the solicitor, who delivers it to the insured, and collects the premium, the solicitor's knowledge of concurrent insurance on the property in excess of the amount allowed by the policy may be imputed to the company so as to estop it to deny the validity of the policy by reason of the breach of such condition.—PALATINE INS. CO. v. MCELROY, U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 391.

60. INSURANCE—Forfeiture—Waiver.—The acceptance of checks in payment of life insurance premiums, notwithstanding notices were sent to a policy holder to remit in a different manner, was a waiver of the company's right to forfeit a policy because the premium was paid by check, though otherwise directed by the usual notice.—HOLLOWELL v. LIFE INS. CO. OF VIRGINIA, N. Car., 35 S. E. Rep. 616.

61. INSURANCE—Proofs Loss—Waiver.—A denial of liability upon a policy made by an insurance company to a third party, within the period prescribed for making proofs of loss, will, if it comes to the knowledge of the insured, operate as a waiver of proofs of loss.—MERCHANTS' INS. CO. OF NEW YORK v. NOWLIN, Tex., 56 S. W. Rep. 199.

62. INSURANCE—Waiver—Agent.—Under Rev. St. § 1481, providing that one who solicits insurance in behalf of a foreign insurance company, or who takes or transmits any application for insurance, or who collects any premiums, or examines into any loss, shall be held to be "the acting agent of the company for which the act is done," an agent of such company who takes an application for insurance, receives the premiums, delivers the policy, notifies the company of the loss, and inspects the ruins with the adjuster, is an agent whose knowledge of the forfeiture of the policy is imputable to the insurer.—NORRIS v. HARTFORD FIRE INS. CO., S. Car., 35 S. E. Rep. 572.

63. JUDGMENT—Constitutional Law — Foreign Judgments.—The full faith and credit clause of the federal constitution, as regards the effect of judicial proceedings of one State in the courts of another, does not militate against the effect of a statute of limitations of this State, as regards the remedy to enforce claims, whether based on judgments in the courts of another State or not.—FIELDS v. MUNDY'S ESTATE, Wis., 82 N. W. Rep. 343.

64. JUDGMENT — Default Judgment — Vacation.—Defendant, a non-resident, was served with process in the case while passing through the State, but consulted with local attorneys, whom he engaged to protect his interests. Through sickness, one attorney was unable to attend to the matter; and, by a mistake of the other as to the day of default, the answer was not filed in time. Held, that it was error for the trial court to overrule defendant's motion to set aside the default, where he showed that he had a meritorious defense.—SPRINGER v. GILLESPIE, Tex., 56 S. W. Rep. 369.

65. JUDGMENTS—Estoppel—Res Judicata.—Where defendant, being the owner of a certain tract of land, a parcel of which was in the possession of a third party, was called in, as warrantor, to defend an action to try title to such parcel, he was such a party in interest in that action as to render the questions therein decided *res judicata* in an action by the same plaintiff to try title to the entire tract.—HANRICK v. GURLEY, Tex., 56 S. W. Rep. 330.

66. JUDGMENT — Modification.—Defendant contested her individual liability on the joint and several obligation of herself and her co defendants, and obtained a judgment in the superior court, but was adjudged individually liable by the supreme court. Held, that the allowance thereafter by the superior courts of an amendment of her answer to determine the rights of herself and co-defendants, against whom judgment by default had been taken, as between themselves merely, was not improper, as attempting to alter or modify the judgment of the supreme court.—MOREHEAD BANKING CO. v. MOREHEAD, N. Car., 35 S. E. Rep. 593.

67. JUDGMENTS — Service of Process — Collateral Attack.—Where suit to foreclose a vendor's lien was brought by an administratrix, and personal service had on defendant in another State, as provided by Rev. St. art. 1230, and thereafter an amended pleading was filed, in which plaintiff claimed to recover in her individual capacity, on which judgment was entered, reciting the non-residence of defendant and service in the manner required by law, it will be presumed, in a collateral attack on such judgment that, defendant was again served after the filing of the amended pleading.—GALLOWAY v. STATE NAT. BANK OF FT. WORTH, Tex., 56 S. W. Rep. 236.

68. LANDLORD AND TENANT — Abandonment of Premises—Reletting.—Where a tenant abandons leased premises before the expiration of his term, and his offer to surrender has been refused by the landlord, who then relets to a new tenant in his own name, the acceptance by the landlord of the offer of surrender by the original tenant will be presumed, as the reletting creates an estate inconsistsnt with that of the original tenant.—GRAY v. KAUFMAN DAIRY & ICE CREAM CO., N. Y., 56 N. E. Rep. 903.

69. LIFE INSURANCE — Contract—By What Law Governed.—Where an application for life insurance, which was made a part of the contract of insurance, recited that it was made "subject to the charter of the company and the laws of the State of New York," where the company was domiciled, the policy was there issued, and both policy and premiums were made payable there, the contract is governed by the laws of New York, although the application was signed and the policy delivered in another State, where the insured resided.—MUTUAL LIFE INS. CO. OF NEW YORK v. DINGLEY, U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 408.

70. LIFE INSURANCE—Evidence to Vary Contract.—In an action to recover on a written contract for life in-

surance, and upon an alleged subsequent verbal modification of the same statements and representations made by the agent who solicited the policy, prior to and contemporaneous with the issue of the policy, are inadmissible to vary, in any respect, the terms of the written policy. In the absence of proof of fraud or mistake, such statements and representations are merged in the written contract.—UNION CENTRAL LIFE INS. CO. v. HOOK, Ohio, 56 N. E. Rep. 906.

71. LIFE INSURANCE POLICY — Application — Conditions—"Sound Health."—Where a life insurance policy contains a condition to the effect that no obligation is assumed by the company, unless at the date of the policy the insured is alive and in sound health, there can be no recovery upon such policy if it is made to appear upon the trial that the insured was not in sound health at the date of the policy.—METROPOLITAN LIFE INS. CO. v. HOWLE, Ohio, 56 N. E. Rep. 908.

72. LIMITATIONS—Suspension—Guarantors and Sureties.—Rev. St. art. 3369, providing that, in case of the death of any person against whom there may be a cause of action, limitation shall cease to run until 12 months after such death, does not suspend the limitation as to a guarantor or surety on a note of a decedent, since article 1204 expressly provides that the guarantor and surety on any contract may be sued without suing, or having previously sued, the principal obligor, when he is dead.—ACERS v. ACERS, Tex. 56 S. W. Rep. 196.

73. MASTER AND SERVANT—Discharge—Damages—Evidence.—Where a traveling salesman's contract entitled him to expenses for board and lodging while on the road, and contemplated that he should spend part of his time at his employer's place of business, it was proper, in an action for his wrongful discharge, to allow the jury to take into consideration the length of time he would probably have been on the road, according to the general custom of the trade in which he was engaged, in determining the amount he would be entitled to for board and lodging during such period.—ESTES v. DESNOYERS SHOE CO., Mo., 56 S. W. Rep. 316.

74. MASTER AND SERVANT — Employers' Insurance.—Where defendant insured plaintiff against loss from liability for injuries to its employees, and agreed to defend actions for injuries to employees brought against plaintiff, providing plaintiff maintained its premises in conformity to law, defendant could not withdraw from the defense of such an action before trial, on the ground that plaintiff had not maintained its premises in conformity with law, where plaintiff's violation of law was not established, but was a question of fact for determination at the trial.—GLENS FALLS PORTLAND CEMENT CO. v. TRAVELERS' INS. CO., N. Y., 56 N. E. Rep. 897.

75. MASTER AND SERVANT — Fellow-Servants.—In a woolen mill employing from 250 to 300 persons, all of whom were under a superintendent, a machinist whose duty it was to make general repairs on the machinery and changes, when directed by the superintendent, who also had authority over the firemen, an assistant machinist, and helpers, all of whom he employed, but whose principal duties required him to work with his hands, was a fellow servant with another employee, whom he called to assist him in repairing a machine, and for his negligence, resulting in an injury to such other servant in the performance of the work, the master cannot be held liable.—STEVENS v. CHAMBERLIN, U. S. C. C. of App., First Circuit, 100 Fed. Rep. 378.

76. MASTER AND SERVANT — Fellow-Servant—Negligence.—In an action by an employee against a master for injuries alleged to have been caused by the incompetency and negligence of a co-employee, it is not erroneous for the court to make a distinction between incompetency and negligence, and to submit to the jury only the question of negligence, where the evidence was entirely directed to the manner in which such co-employee performed his work, and the knowledge of plaintiff and defendant in respect thereto.—OLSEN v. NORTH PACIFIC LUMBER CO., U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 384.

77. MASTER AND SERVANT — Negligence—Assumption of Risk.—There is no "assumption of risk" merely from an employee operating a machine which he knows is lacking in safety appliances which have come into general use.—LLOYD v. HANES, N. Car., 35 S. E. Rep. 611.

78. MASTER AND SERVANT—Negligence—Failure to Notify Servant of Danger.—Plaintiff, while employed by defendant company, was ordered by a vice-principal of defendant to paint a hot boiler with coal tar. While painting the boiler, some of the tar popped into his eye, eventually causing its loss. Plaintiff was ignorant of such work, and was not told of such danger by the vice-principal. Coal tar was a proper material to paint boilers with, and no such accident was shown to have occurred before, and the vice-principal was not aware of any danger that might arise from its use. Held, that the master was not liable for negligence in not instructing the servant of the danger, as it was not such a danger as would require special precautions to avoid.—SAN ANTONIO GAS CO. v. ROBERTSON, Tex., 56 S. W. Rep. 323.

79. MONOPOLIES — Corporations — Anti-Trust Law—Sales.—The anti-trust law (Acts 1897, p. 160), prohibiting combinations between persons or corporations restraining free competition, does not affect contracts of sales, nor their enforcement, made before the passage of the act, by a corporation which has entered into a combination with other corporations in violation of the act, subsequently to the sales, as the law is not retrospective in its operation.—STERLING REMEDY CO. v. WYCKOFF, SEAMANS & BENEDICT, Ind., 56 N. E. Rep. 911.

80. MORTGAGES—Trusts.—Where one purchases land under a parol trust to the effect that the *cestui que trust* should be entitled to a conveyance on payment of the purchase price and certain debts which the latter owed the former, such purchaser's interest in the land, though he holds the legal title, is substantially that of a mortgagee, and extends only to the amount of such purchase money and debts.—CRUDUP v. THOMAS, N. Car., 35 S. E. Rep. 602.

81. MORTGAGE—Trust Deed—Attorney's Fees.—Where a trust deed provides for an attorney's fee in case the property is sold, the trustee cannot pay such a fee from the proceeds of the sale and charge it as an expense, as the provision in the deed is void, as contrary to public policy.—TURNER v. BOGER, N. Car., 35 S. E. Rep. 592.

82. MUNICIPAL CORPORATIONS—Board of Aldermen—Contract.—Where plaintiff, who was a member of the board of aldermen of the defendant city, entered into a contract with that board to superintend the streets of the city for $50 per month for a term of six months, such a contract was void as contrary to public policy.—SNIPES v. CITY OF WINSTON, N. Car., 35 S. E. Rep. 610.

83. MUNICIPAL CORPORATIONS — Contracts—Debts.—Under Const. art. 11, prohibiting a municipal corporation from creating any debt unless provision is made at the time for levying and collecting a sufficient tax to pay interest thereon, and for creating a sinking fund of at least 2 per cent., a contract made by a city for the purchase of fire hose, without any provision being made for its payment as required, is void.—MINERALIZED RUBBER CO. v. CITY OF CLEBURNE, Tex., 56 S. W. Rep. 220.

84. MUNICIPAL CORPORATIONS—Defective Streets.—Where a city had permitted plumbers to dig ditches in its streets, it was not error, in an action for an injury resulting to plaintiff from his falling into such a ditch, to refuse to instruct that recovery against the city could not be had because it had not constructed the ditch.—FOY v. CITY OF WINSTON, N. Car., 35 S. E. Rep. 609.

85. MUNICIPAL CORPORATIONS Franchises—Bidding.—That a city council advertised for bids for a franchise

for a proposed waterworks before the specifications therefor were completed and could be seen by intending bidders is insufficient to show an illegal cutting off and chilling of the bidding, where the city council readvertised for 30 days after the specifications were completed and accessible to all who asked for them.—JOHNSON v. CITY OF ROCKHILL, S. Car., 35 S. E. Rep. 568.

86. MUNICIPAL CORPORATIONS—Negligence—Defective Sidewalk.—To render a city liable for injuries sustained through a defective sidewalk, it must appear that the city had either actual or constructive notice of its condition, and time to remedy the same before the accident.—BUCKLEY v. KANSAS CITY, Mo., 56 S. W. Rep. 319.

87. MUNICIPAL CORPORATIONS—Public Improvements.—The action of the assembly and mayor of a municipal corporation in passing on the good policy of, or necessity for, a proposed public improvement, cannot be reviewed by the courts.—CITY OF ST. LOUIS v. BROWN, Mo., 56 S. W. Rep. 298.

88. NEGLIGENCE—Actions.—What was the proximate cause of an injury is ordinarily a question for the jury, and when it has been determined by them their finding is conclusive, unless it can be said that all reasonable men must draw a different conclusion from the facts of the case.—MISSOURI, K. & T. RY. CO. v. BYRNE, U. S. C. C. of App., Eighth Circuit, 100 Fed. Rep. 359.

89. NEGLIGENCE — Defective Bridges—Contributory Negligence.—Under Rev. St. 1893, § 1169, making a county liable for an injury to a person from a defect in a bridge occasioned by its negligence, provided he "has not in any way brought about such injury by his own act or negligently contributed thereto," it is error to instruct that the person's negligence would be no defense unless it was the efficient, immediate, or proximate cause of the injury.—MCFAIL v. BARNWELL COUNTY, S. Car., 35 S. E. Rep. 562.

90. NEGLIGENCE—Unguarded Elevator—Instructions.—It is negligence for the owner and lessees of a building, who each use an elevator, to permit a door opening into the shaft to be partially open and unguarded with nothing on it to indicate that it opened into an elevator shaft, where it was situate in a dimly-lighted hall, to which the public were invited, and might be readily mistaken for a door leading to the business rooms of one of defendants.—RHODIUS v. JOHNSON, Ind., 56 N. E. Rep. 942.

91. PLEADING—Complaint—Special Findings.—Error in overruling a demurrer to a complaint for want of material allegations is not rendered immaterial by a special verdict or special finding of fact, as they cannot supply essential averments omitted from the pleading.—LAKE ERIE & W. R. CO. v. HOFF, Ind., 56 N. E. Rep. 925.

92. PLEADING—Sufficiency of Complaints.—A complaint on a contract of indemnity given by defendant to plaintiff bank to secure it against the fraudulent acts of its cashier, alleging the execution of the bond, and its renewal, and setting out their substantial features, the fraudulent acts of the cashier, and notice to defendant, states a cause of action, without setting out all the conditions of the bond and application therefor.—BANK OF TARBORO v. FIDELITY & DEPOSIT CO. OF MARYLAND, N. Car., 35 S. E. Rep. 588.

93. PRINCIPAL AND SURETY—Bond of Contractors for Public Work.—The liability of sureties on the bond of a contractor for government work, conditioned, as required by act of August 13, 1894 (28 Stat. 278), to persons who supplied labor or materials in the prosecution of the work, is not affected by the amount which may have been expended by them in completing the contract of the principal after the government had taken it out of his hands.—UNITED STATES v. RUNDLE, U. S. C. C. of App., Ninth Circuit, 100 Fed. Rep. 400.

94. PRINCIPAL AND SURETY—Release.—An order of court allowed an administrator to compromise an action brought by him on the bond of a former administrator, and provided that he might release each or either of the three sureties on their paying $1,000, the same being one-third of the compromise amount, and that on receiving said sum the administrator might receipt therefor, and dismiss the action as to the surety paying said sum. Held, that the release of one surety did not operate to release the others, though the receipt given to one expressed no reservation of the right of action against the others.—ULRICH v. HOEFLING, Tex., 56 S. W. Rep. 199.

95. PUBLIC LANDS—Application to Enter Land Partly for Benefit of Others.—A single application to enter 160 acres of land by a person who has made a contract to divide a quarter thereof, when obtained, with another person, in violation of U. S. Rev. Stat. § 2262, cannot be sustained as to any part of the land, but is invalid even as to the part which he had not agreed to divide.—HYDE v. BISHOP IRON CO., U. S. S. C., 20 Sup. Ct. Rep. 592.

96. RAILROAD COMPANY—Injunction—Abutting Property Owners.—An abutting property owner is not entitled to enjoin the construction of a street railroad because his property would be injuriously affected or damaged thereby, or because the railroad was not legally authorized.—GENERAL ELECTRIC RY. CO. v. CHICAGO & W. I. R. CO., Ill., 56 N. E. Rep. 963.

97. RAILROAD COMPANY—Negligence—General Verdict.—In an action to recover for the alleged willful and wanton killing of plaintiff's son at a crossing, the jury returned a general verdict for plaintiff, and specially found that the train was running 15 miles an hour in the evening, in violation of a city ordinance, without headlight or lookout; that the bell was not rung nor the whistle sounded before reaching the crossing, and, though the engineer did not see deceased before the engine struck him, he might have seen him when within 80 feet of the cab, and could not then have avoided the injury; and that the engineer did not know that deceased was on the track or in dangerous proximity thereto before he was killed. Held, that such facts did not show a willful and wanton killing of deceased, and the court properly rendered judgment for defendant, notwithstanding the general verdict for plaintiff.—HUFF v. CHICAGO, I. & L. R. CO., Ind., 56 N. E. Rep. 932.

98. RECEIVERS—Liability Under Statutes Regulating Carriers of Live Stock.—Railroad receivers are not liable to an action for penalties under U. S. Rev. Stat. §§ 4386-4389, for failure to comply with the regulations as to transportation of live stock by "any company, owner, or custodian of such animals," since receivers are plainly not within the letter of the statute and not necessarily within its purpose or spirit, and therefore, as the statute is penal, it cannot be construed to extend to them.—UNITED STATES v. HARRIS, U. S. S. C., 20 Sup. Ct. Rep. 609.

99. REFORMATION OF INSTRUMENT —Limitations.—Where suit is on a mortgage given in renewal of another, and by fraud of the mortgagee who drew them, or by mutual mistake, both instruments failed to except land as agreed, and he, when the second mortgage was executed, as well as when the first was executed, represented that, it was prepared in accordance with the agreement, limitations against the mortgagor's right to reformation do not commence to run prior to execution of the second mortgage.—AMERICAN FREEHOLD LAND MORTG. CO. OF LONDON v. PACE, Tex., 56 S. W. Rep. 877.

100. REFORMATION OF TRUST DEED—Description.—A deed of trust was executed by a husband and wife, conveying separate property of the wife, to secure the husband's debt. All statutory requirements were complied with. The deed conveying to the wife described the buildings on the property, but erroneously described the lot numbers; and such error was incorporated in the deed of trust, which described the lots as the property theretofore conveyed to the wife, and gave the dimensions of the property, and date and record of the deed. The property intended to be conveyed was pointed out by the husband, and neither he

nor his wife owned other lots in the block described. Thereafter a deed of correction was executed to the wife by her grantors, correctly describing the lot numbers, and reciting the erroneous description in their former deed. Held that, in the absence of allegation and proof of fraud and collusion, equity would reform such deed.—AVERY v. HUNTON, Tex., 56 S. W. Rep. 210.

101. REMOVAL OF CAUSES — Joinder of Unnecessary Parties.—Persons whose interests in mortgaged property were cut off by a decree foreclosing a first mortgage thereon, and a sale of the property thereunder, are not necessary parties to a suit to redeem brought by a second mortgagee, who was not made a party to the first suit; and their joinder will not prevent a removal of the suit by the purchaser, who is the only real party in interest as defendant.—TITLE GUARANTEE & TRUST CO. v. STUDEBAKER, U. S. C. C., N. D. (Ill.), 100 Fed. Rep. 358.

102. RES JUDICATA—Identity of Causes of Action.—In a suit for the specific enforcement of a contract, a plea setting up a former decree in a suit by the same complainant as a bar is insufficient, where it appears from the record of such suit that the contracts alleged in the two bills are so different, although relating to the same subject-matter, that proof of the contract alleged in one bill would not support the other.—JONES v. HILLIS, U. S. C. C., W. D. (Mich.), 100 Fed. Rep. 355.

103. SALES—Action—Bailment.—Where plaintiff sued for the price of wheat alleged to have been sold and delivered to defendants, and the undisputed evidence showed that the wheat was delivered to defendants only for storage, it was error to render judgment for plaintiff.—BARROWS v. WAMPLER, Ind., 56 N. E. Rep. 935.

104. SCHOOLS AND SCHOOL DISTRICTS — Establishment of.—Rev. St. 1889, § 8088, requires the board of directors of school districts to divide the district into school wards, and fix their boundaries, locate and establish primary schools adequate in number to the demand of the district, and also authorizes the board to establish schools of higher grade. Held, that where the directors of a district established a primary school for colored children, and another for white children, sufficient to accommodate all the children of the district with in the primary grade, it was the duty of such directors to establish a high school, rather than more primary schools, merely to meet the demands of accessibility or convenience to residences of pupils.—STATE v. JONES, Mo., 56 S. W. Rep. 307.

105. TAXATION—Claim Against Decedent's Estate for Personal Taxes.—Investments by a non-resident of the State are subject to taxation under the laws of the State, when made by a resident agent who is employed to invest and reinvest moneys, at whose office the loans are made payable, and who retains the mortgages securing them, and to whom the notes taken for the loans are returned from time to time whenever required for the purpose of renewal, collection, or foreclosure of securities, notwithstanding the fact that the notes are sent out of the State to the principal and the agent has no authority to execute satisfaction of mortgages.—BRISTOL v. WASHINGTON CO., U. S. S. C., 20 Sup. Ct. Rep. 585.

106. TAXATION—License Tax.—The fact that a merchant in a country town sometimes, as occasion requires, takes lumber or shingles in payment of a debt, or in exchange for goods kept by him for sale, does not make him a lumber dealer, within the revenue act (Laws 1899, ch. 11, § 58), imposing a license tax of $10 on lumber dealers; the word "dealer" implying an habitual course of dealing.—STATE v. BARNES, N. Car., 35 S. E. Rep. 605.

107. TELEGRAPH COMPANIES—Mental Suffering—Damages.—Where the court, in an action for mental suffering caused by defendant's failure to deliver a telegraph message, had once correctly instructed the jury on the subject of negligence, the fact that it afterwards improperly used the copulative conjunction "and," instead of the disjunctive conjunction "or," in stating that a recovery could be had only where the negligence of the telegraph company was willful, wanton, and gross, was not reversible error.—LEWIS v. WESTERN UNION TEL. CO., S. Car., 35 S. E. Rep. 556.

108. TRIAL—Direction of Verdict.—At the close of the evidence there is always a preliminary question for the judge before the case can properly be submitted to the jury, and that is, not whether or not there is any evidence, but whether or not there is any substantial evidence, upon which the jury can properly render a verdict in favor of the party who produces it. If there is no such evidence, it is the duty of the court to direct the jury to return a verdict against him.—RAILWAY OFFICIALS' & EMPLOYEES' ACC. ASSN. v. WILSON, U. S. C. C. of App., Eighth Circuit, 100 Fed. Rep. 368.

109. TRIAL—Objections to Evidence.—Objections to evidence offered must be so specific that the court may intelligently rule upon them, and the opposite party may, if the case admits of it, remove them by amendment or otherwise. Hence a general objection that the evidence is incompetent, irrelevant, and immaterial is not specific enough, where the real objection relates to the sufficiency of the pleadings.—MERCHANTS' NAT. BANK OF GRAND FORKS, N. D., v. BARLOW, Minn., 82 N. W. Rep. 364.

110. TRUSTS—Conditional Deed.—A conveyance of real and personal property by a father to two of his children, to care for and manage, and out of the proceeds to support the grantor and his wife while they lived, and after their death to divide the same in equal portions among all of his children, but providing that, if the grantees should violate any of the trusts embraced in said deed, then the conveyance should become void, and the property revert to the grantor, is a deed, and not a will.—ROBINSON v. INGRAM, N. Car., 35 S. E. Rep. 612.

111. USURY — Intent.—Under the statute providing that "no greater rate of interest than 7 per cent. shall be charged, taken, agreed on or allowed," a note, either expressly stipulating for a greater rate, or given for more than the amount loaned, with full interest thereon, is usurious, without regard to the intention of the parties.—MITCHELL v. BAILEY, S. Car., 35 S. E. Rep. 581.

112. VENDOR AND PURCHASER — Mortgage—Sale—Evidence.—Where the defense to an action to foreclose a vendor's lien was that the transactions evidenced a mortgage, and not a sale, no fraud being alleged, it was error to admit statements by defendant's wife that she signed the paper under defendant's influence.—CLAFLIN v. HARRINGTON, Tex., 56 S. W. Rep. 370.

113. VENDOR AND PURCHASER — Payment — Installments.—Where plaintiff alleged that there was due her a certain sum in payment on land which defendant had agreed to purchase on installments, and that plaintiff waived its right of forfeiture, and brought into court a deed for the land to deliver to defendant on payment of the installments, some of which were not yet due, the action was not for specific performance, and the complaint was not demurrable because it did not allege performance or tender of performance by plaintiff, or her readiness and ability to perform.—WILE v. ROCHESTER IMP. CO., Ind., 56 N. E. Rep. 928.

114. VENDOR AND PURCHASER — Possessor — Adverse Claim.—One purchasing a lien on land from the record owner is required to inquire of a third person in possession as to whether he has an adverse claim only where the possession is of such character, and held under such circumstances, as would indicate a claim of title in the possessor.—RAMIREZ v. SMITH, Tex., 56 S. W. Rep. 254.

115. WILLS—Equitable Conversion — Void Bequest.—Where a will directs the conversion of realty into personalty for a particular but void purpose, the doctrine of equitable conversion does not apply; but unless otherwise clearly indicated by such will, such realty will pass to the heirs as property undisposed of thereby.—HARRINGTON v. PIER, Wis., 82 N. W. Rep. 345.